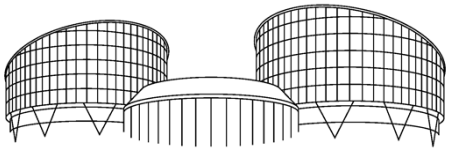

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF SIGURÐUR EINARSSON AND OTHERS v. ICELAND

(Application no. 39757/15)

JUDGMENT

STRASBOURG

4 June 2019

FINAL

04/09/2019

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

In the case of Sigurður Einarsson and Others v. Iceland,

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

Paul Lemmens, *President,*
Julia Laffranque,
Valeriu Griţco,
Stéphanie Mourou-Vikström,
Arnfinn Bårdsen,
Darian Pavli, *judges,*
Ragnhildur Helgadóttir, *ad hoc judge,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 30 April 2019,

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

PROCEDURE

1. The case originated in an application (no. 39757/15) 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 four Icelandic nationals, Mr Sigurður Einarsson, Mr Hreiðar Már Sigurðsson, Mr Ólafur Ólafsson and Mr Magnús Guðmundsson ("the applicants"), on 10 August 2015.

2. The applicants were represented by Mr E. Werlauff, a lawyer practising in Herning, Denmark. The Icelandic Government ("the Government") were represented by their Agent, Mrs Ragnhildur Hjaltadóttir.

3. The applicants alleged, in particular, that in the criminal proceedings against them they had been denied full access to the file held by the prosecution, that insufficient efforts had been made to summon two key witnesses and that the Supreme Court had not been impartial on account of the positions held by family members of one of its judges. They relied on Article 6 §§ 1 and 3(b) and (d) of the Convention in that respect. In addition, the applicants complained that conversations with their defence lawyers had been intercepted and recorded in breach of domestic law. They relied on Article 8 of the Convention in that respect.

4. On 15 June 2016 notice of the above-mentioned complaints was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Mr Robert Spano, the judge elected in respect of Iceland, withdrew from the case (Rule 28 of the Rules of Court). Accordingly, Ms Ragnhildur Helgadóttir was appointed to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant Sigurður Einarsson was born in 1960 and lives in Reykjavík. The applicant Hreiðar Már Sigurðsson was born in 1970 and lives in Luxembourg. The applicant Ólafur Ólafsson was born in 1957 and lives in Pully, Switzerland. The applicant Magnús Guðmundsson was born in 1970 and lives in Luxembourg.

A. Background to the case

7. In the autumn of 2008 a crisis hit the Icelandic financial sector resulting, among other things, in the collapse of one of Iceland's largest banks, Kaupþing banki hf. (hereafter "Kaupþing"). On 9 October 2008 the Financial Supervisory Authority (hereafter "the FME") exercised its authority to take over the powers invested in a shareholders' meeting and to take over the management of Kaupþing immediately, dismissing the Board of Directors and appointing a Resolution Committee to direct the bank. In December 2008 the Office of the Special Prosecutor was established to investigate potential criminal conduct in connection with the financial crisis and, where appropriate, to prosecute those concerned. The Special Prosecutor had police authority to investigate criminal cases as well as prosecutorial authority.

B. The criminal proceedings against the applicants

8. At the relevant time, the applicants held the following positions: Sigurður Einarsson was Chairman of the Board of Kaupþing and Chairman of the Board Credit Committee; Hreiðar Már Sigurðsson was Chief Executive Officer of Kaupþing and a member of the Board Credit Committee; Ólafur Ólafsson was majority owner of a company which indirectly owned another company which was at the time the second largest shareholder in Kaupþing, with 9.88% of its shares; Magnús Guðmundsson was Chief Executive Officer of Kaupþing's subsidiary, Kaupþing Bank Luxembourg S.A. (hereafter "KBL").

9. On 22 September 2008 Kaupþing issued a press release stating that Q, a company owned indirectly by Sheik Mohammed bin Khalifa Al Thani (hereafter "Al Thani"), a member of Qatar's royal family and a wealthy businessman, had bought 5.01% of the share capital of Kaupþing for 25,599,000,000 Iceland krónur (ISK). An investigation revealed that Kaupþing had provided a loan for the entire purchase price of the shares, which the bank itself had owned prior to their sale: two companies in the British Virgin Islands, ST and GA, the former of which was owned by

Al Thani and the latter by the applicant Ólafur Ólafsson, had each obtained a loan from Kaupþing amounting to half the purchase price, which they had then lent to a Cypriot company, CS, itself owned by the two said companies. CS had then provided a loan to Q for the purchase price. The loan transactions and the payment for the shares had all been made on 29 September 2008. Shortly before, Kaupþing had also provided BT, another company owned indirectly by Al Thani, with a loan in the amount of 50,000,000 US dollars (USD), which had been disbursed on 19 September into BT's account with Kaupþing's subsidiary, KBL. Neither the loan to GA nor the loan to BT had had the necessarily approval of Kaupþing's Board Credit Committee, and no or insufficient securities had been provided for them.

10. On 9 December 2008 the FME was informed of possible suspicious transactions in Kaupþing's operations shortly before the bank collapsed. Having made inquiries, the FME submitted a complaint to the Special Prosecutor on 13 March 2009. The Special Prosecutor then conducted a criminal investigation which lasted almost three years and led to an extensive collection of data (see paragraphs 14-25 below). Moreover, the applicants and ten other individuals had their telephone conversations intercepted.

11. On 16 February 2012, the Special Prosecutor issued an indictment charging Hreiðar Már Sigurðsson and Sigurður Einarsson with breach of trust under Article 249 of the Criminal Code, and the other two applicants with participation in certain of those offences. These charges related essentially to the provision of unsecured loans without the appropriate authorisations. In addition, all the applicants were charged with market manipulation under section 117 of Act No. 108/2007 on Securities Transactions for giving a misleading picture of the transactions in question.

12. The case was submitted to the Reykjavík District Court on 7 March 2012 and the main hearing took place from 4 to 14 November 2013. Forty witnesses gave evidence, including the applicants. On 12 December 2013 the District Court rendered its judgment, convicting the applicants as charged and sentencing them to between three years' and five years six months' imprisonment.

13. The applicants appealed to the Supreme Court which, in a judgment of 12 February 2015, found the applicant Ólafur Ólafsson guilty of market manipulation and the other three applicants guilty of breach of trust and market manipulation. Hreiðar Már Sigurðsson was sentenced to five years and six months' imprisonment, Sigurður Einarsson was sentenced to four years' imprisonment and the other two applicants were sentenced to four years and six months' imprisonment.

14. Three of the applicants lodged petitions with the Committee on Reopening of Judicial Proceedings (*Endurupptökunefnd*), seeking to have the proceedings before the Supreme Court reopened. Their petitions were

based *inter alia* on the ground that there had been significant defects in the procedure, as one of the Supreme Court judges, Á.K., had been disqualified from sitting in the case on account of his wife's and his son's connection to the case (see paragraphs 33-35 below). On 26 January 2016 the petitions were rejected. Magnús Guðmundsson did not lodge a petition for reopening.

C. The procedural issues raised during and after the proceedings

1. Access to documents

15. During the investigation, the Special Prosecutor, on the basis of court warranted searches, seized large amounts of documents and electronic data, including from Kaupþing and KBL. The Government identified three different categories of data: "full collection of data" (*heildarsafn gagna*) referred to all the data seized and held by the Special Prosecutor, regardless of whether it had relevance to the case or not; "investigation documents" (*rannsóknargögn*) referred to the data, documents and other materials extracted from the full collection of data which had been defined by the Special Prosecutor as relevant to the case and which were marked as part of the "investigation file"; "evidence in the case" referred to the documents and other materials that were submitted in court by the prosecution or the defence and were part of the "case file" in the court proceedings.

16. In order to conduct a search of the electronic data, the Special Prosecutor used an e-Discovery system named "Clearwell". Certain keywords were entered into the programme, which then gave a collection of documents containing those words. Three separate Clearwell searches were carried out to sort out roughly the documents that might have relevance to the case, and after the searches new Clearwell case folders were created containing these "tagged" documents (which the applicants regard as a separate category). These folders were given the following names:

- ESS KAU Q Iceland, containing 8,956 documents, derived from Kaupþing's computer systems, where e-mails and personal drives of 62 employees were searched through, and from other items seized in searches at three companies related to the applicants and at a law firm, as well as from items handed over by the FME;
- ESS KAU Q Iceland 2, containing 54,468 documents, from Kaupþing's computer systems and from KBL; the e-mails of 11 employees of these companies in the period from 1 September to 31 October 2008 were searched;
- KAU KBLUC, containing 712,378 documents, derived from KBL's computer systems after searching through all e-mails of 13 employees from December 2006.

The documents in these Clearwell folders were subsequently reviewed by the investigators by making further searches using the Clearwell system and by reviewing them manually. Those documents that were regarded as

having a connection with the case were then tagged and exported and made into "investigation documents".

17. During the course of the investigation, the applicants' lawyers were regularly provided with copies of the "investigation documents". However, they were denied copies of dvd recordings of statements by witnesses and the accused, on the ground that the requested material did not constitute a "document" within the meaning of section 37 § 1 of the Criminal Procedures Act (Law No. 88/2008: see paragraph 36 below); instead, they were invited to access these recordings in the premises of the Special Prosecutor, a procedure which was validated by the Supreme Court in decisions of 21 September 2009 by which it rejected the applicants' requests to obtain copies. However, transcripts of all recorded depositions were made and handed over to the applicants, albeit with some delay on account of the volume of the material.

18. When the case was submitted to the District Court, the defence received a copy of all the evidence submitted to the court by the prosecution, except for the aforementioned dvd recordings, of which transcripts were however provided. Moreover, the prosecution also submitted a list of all "investigation documents", as well as those that it had decided not to submit as evidence. Included in the submitted evidence were files on all seized items in the case, along with rough overviews of what the items contained and which evidence, if any, had been collected from each seized item.

19. The applicants and their lawyers repeatedly complained to the Special Prosecutor that their right of access to documents had been breached. At preliminary court sessions on 29 March and 27 April 2012 the applicants requested that the Special Prosecutor be required to hand over "a copy of the register of events (log-register) about connections between telephone calls or any other data which may have been created during the investigation of the case at the Office of the Special Prosecutor and which contains an overview of telephone calls which were tapped on the basis of rulings on tappings in the case", as well as copies of all e-mails which had passed through their e-mail addresses and had been seized by the Special Prosecutor during the investigation. On 4 May 2012 the District Court dismissed the request, noting that the prosecution had stated that the data in question was accessible in the premises of the Special Prosecutor, where the defence could review it and, if appropriate, request that documents be submitted to the court as evidence. Following an appeal, the Supreme Court instructed the District Court to take a substantive position on the request. In a ruling of 29 May 2012 the District Court reiterated that the documentation was accessible to the accused. It further observed that while the prosecution should be considered generally to be under an obligation to grant the defence access to data acquired by the police during an investigation but not submitted to the court, the police and prosecution were not obliged to hand

over copies of such data to the defence. On 8 June 2012 the Supreme Court upheld the District Court's decision. Subsequently, the Special Prosecutor granted access to the data in question upon request.

20. On 20 November 2012 the District Court dismissed the applicants' request for dismissal of the case on account of the alleged breach of their right of access to documents. The indictment was partly dismissed on other grounds but that decision was overturned by the Supreme Court on 10 December 2012.

21. In January 2013 the Special Prosecutor informed the defence that only documents and data marked by the investigators as relevant were considered to constitute "investigation documents" and that access did not extend to the "full collection of data" or to the collection of documents which had been identified in the Clearwell rough searches. However, the applicants would have access to their own e-mails, as well as to recordings of their own tapped telephone conversations, in so far as these were still stored at the relevant time. The defence was also informed that a complete list of recorded telephone conversations did not exist.

22. The defence disputed that the above limitations were in compliance with domestic law and the Convention. The Special Prosecutor replied on 22 January 2013, referring to the obligation of the police to consider equally evidence against and in favour of the accused. He noted that an indictment was not accompanied by all investigative documents but only those on which the prosecution based its case, and that all investigation documents were nevertheless listed in the main document file, so that it was clear which documents had not been submitted. Those investigation documents could be reviewed in the premises of the prosecution after the case had been submitted to the court.

23. At a court session on 24 January 2013 the prosecution submitted a large part of the documents requested by the applicant Hreiðar Már Sigurðsson, as well as transcripts of certain phone calls which had been unknown to the prosecution until after the court proceedings began. On 7 March 2013 the prosecution submitted further evidence requested by the defence, as well as further transcripts of phone calls which it had received after submitting the case to the court.

24. At a preliminary court session on 21 March 2013 the applicants requested "a summary of all documents and other materials which have been acquired by the police and have not been submitted in the case" or, alternatively, a summary of all documents which had been acquired during the investigation by the police, that had been identified in a Clearwell search programme, and had been given the names "ESS KAU Q Iceland", "ESS KAU Q Iceland 2" and "KAU KBLUC" and had not been submitted in the case. As a further alternative, they requested a summary of all documents which had been acquired during the investigation, identified using the Clearwell programme and given the aforementioned names, which

could be found using 15 specified search words or connections. The prosecution opposed those requests on the ground that such documents did not exist. The District Court, in a ruling of 26 March 2013, dismissed the applicants' requests on the ground that section 37 § 1 of the Criminal Procedures Act applied only to data which had come into being and were still available but did not oblige the police or the prosecution to prepare documents at the request of the defence. On 4 April 2013 the Supreme Court dismissed an appeal on the ground that the ruling in question could not be appealed against.

25. In the context of the applicants' appeal against their conviction, they requested dismissal of the case *inter alia* on the ground that their right to have access to documentation, guaranteed by Article 70 § 1 of the Constitution and Article 6 of the Convention, had been violated. In its judgment, the Supreme Court noted that the applicants had been invited to access the "aggregate collections of data". It then observed in relation to the request dismissed by the District Court on 29 May 2012 that it could not be overlooked that the collection of data seized by the police was enormous in scope and that among the data were e-mail communications that by their nature had to concern the financial affairs of a great many customers of Kaupþing and which had to be kept confidential, as well as personal messages concerning the private lives of employees. It further noted that the requests dismissed by the District Court on 26 March 2013 had related to the preparation of specific documents for the applicants rather than access to them. In neither of the District Court's rulings had the applicants been denied access to specific documents; rather, they had been refused copies of an extensive collection of documents, which they had however been invited to access on the police premises. Thus, the rejection of the requests had not restricted the applicants' right to access documents.

26. The Supreme Court finally noted that the applicants had not made any other requests to the District Court for access to documents. It observed that "when an assessment is made as to whether the right of an accused man to access to documents has been restricted ..., the basic condition must be satisfied that a demand concerning that matter has been referred to the courts." Consequently, it held that there were no grounds for dismissal of the case on the basis of a violation of the right of access to documents.

2. Hearing of witnesses

27. Shortly after the investigation began, the Special Prosecutor contacted Mr S.S., a British lawyer who had represented Al Thani and his relative and adviser, Sheik Sultan (hereafter "Sultan"), in their dealings with Kaupþing. Representatives of the Special Prosecutor met with Sultan in London in October 2009 and with Al Thani in October 2011, to obtain information about the case. The defence was not notified of these interviews or given an opportunity to participate. In the view of the Special Prosecutor,

the interviews did not constitute formal depositions within the meaning of chapter VIII of the Criminal Procedures Act but rather informal questioning within the meaning of section 60 § 2 of the Criminal Procedures Act. The interviews were recorded and the audio recordings as well as written transcripts were included in the evidence submitted by the prosecution to the trial court.

28. When the case was submitted to the District Court, the prosecution submitted a list of witnesses which it wished to have summoned to testify, including Al Thani and Sultan. On 10 February 2013 the prosecution contacted S.S. by e-mail and asked him to inform his clients of the prosecution's decision and the court's wish to hear both of them in person during a hearing in April. S.S. was also informed that his clients could, if they preferred, give evidence by telephone. On 21 February 2013 S.S.'s law firm informed the prosecution that Al Thani and Sultan were prepared to provide short statements confirming what they had previously said during their interviews but that they did not otherwise wish to participate in the proceedings in Iceland. At a court hearing on 7 March 2013, the prosecution informed the District Court that Al Thani and Sultan had refused to testify in court. No further attempts were made by the prosecution or the court to have them testify. The records of the hearing do not indicate that the defence at that point or before the main hearing commented on the witnesses not testifying or made any claims or requests that further attempts be made to summon them.

29. In their appeals to the Supreme Court against their convictions, the applicants submitted that insufficient attempts had been made to have Al Thani and Sultan testify in court. The Supreme Court considered, however, that the District Court judgment could only be quashed on that basis "if it were shown that [their] testimony ... might have had a significant impact on the conclusion regarding some issue in the case". It also emphasised that the prosecution would have to bear the adverse consequences of the lack of that evidence.

3. Telephone tapping

30. In connection with the investigation of the case, and of other cases involving the applicants which were being investigated at the same time, the Vesturland District Court granted the Special Prosecutor several warrants to tap all phone calls made to and from all phone numbers registered to or being used by the applicants. The applicants' phones were tapped in the period from 9 to 27 March 2010. The Special Prosecutor informed the applicants by letter of 28 December 2011 that the tapping had taken place and informed them that the records from the phone tapping would be deleted in accordance with section 85 § 1 of the of Criminal Procedures Act.

31. During the period from February to April 2013, the applicants examined their tapped telephone conversations which were stored by the

Special Prosecutor and discovered that among the phone calls were four calls between Hreiðar Már Sigurðsson and his lawyer and one call between Magnús Guðmundsson and his lawyer. Those applicants' lawyers each wrote to the Special Prosecutor in this connection and also submitted a complaint to the State Prosecutor against the employees at the Office of the Special Prosecutor. The Special Prosecutor replied to Hreiðar Már Sigurðsson's lawyer, stating that a mistake had been made as the phone calls in question had not been deleted immediately pursuant to section 85 of the Criminal Procedures Act, but that they had since been deleted. He described the phone tapping process as follows. The calls had been recorded with help from the Computer Forensics Division of the Rejkjavík Metropolitan Police; they had been scanned by the investigators, who had at the same time made brief notes about what they regarded as relevant to the investigation of the case; the investigators had been instructed to stop listening to phone calls when it became clear that a defendant was speaking to his defence lawyer and not to record what had been revealed in the conversation up until that point. However, an employee responsible for documenting the phone calls had made the mistake of not mentioning the phone calls in question when writing a memorandum, and as a result they had been omitted from a list of phone calls that should be deleted. The Special Prosecutor emphasised that the phone calls had not been listened to and that confidentiality had been respected.

32. The State Prosecutor, by letters of 24 April 2013 and 14 February 2014, decided to suspend the investigations into the complaints which had been lodged. In the letter to Hreiðar Már Sigurðsson, it was considered that the explanations provided by the Special Prosecutor were satisfactory; in the letter to Magnús Guðmundsson, it was noted that the tapping had been carried out in accordance with the Criminal Procedures Act, which was based on the premise that it was unavoidable that conversations between defendants and their lawyers would be recorded along with other conversations. It was added that nothing seemed to indicate that the applicant's conversations had been listened to or used for the purposes of the investigation or in the submission of evidence. It therefore had to be considered that it had been a mistake or accident, and could not be considered to constitute gross negligence or intent.

33. In their appeals to the Supreme Court against their convictions, the applicants in question referred to the recording of telephone conversations between them and their lawyers. The Supreme Court emphasised that there were no transcripts of any such recorded conversations in the case file, so that it was clear that they had not been used as evidence before the court. It further noted that it was not apparent how the police could arrange their procedures for tapping a defendant's telephone in any other way, since it could not be known in advance whether the conversation would be with a defence lawyer. Moreover, as to the applicants' suggestion that parties other

than police employees could have ascertained the nature of the conversations, the Supreme Court observed that the police had no authority to assign this task, which involved intrusion into private life, to others. Finally, the Supreme Court noted that no arguments had been presented to the effect that any such recordings had actually affected the investigation of the case or that there could have been a realistic danger of that.

4. Impartiality

34. On 8 December 2014 the Supreme Court informed the parties that Á.K., a former Supreme Court judge, would be sitting as an *ad hoc* judge in the appeal. The Supreme Court received no comments in that respect, but the defence commented on the possible lack of impartiality of another Supreme Court judge, who subsequently withdrew. By e-mail of 19 December 2014, the Supreme Court informed the parties that Á.K.'s wife, Mrs S., had been a member of the Board of the FME until January 2009 and invited them to submit their observations on the matter. Upon a request from one of the defence lawyers, further information on the exact day Mrs S. had left the FME Board was sent to the parties. By 23 December 2014 the Supreme Court had received answers from all the parties, stating that no objections were made as to the participation of Á.K. in the proceedings.

35. The Government informed the Court in their observations that they had received a statement from Á.K. dated 19 September 2016 in which he stated that his wife, Mrs S., had been appointed Vice-Chair of the Board of the FME on 1 January 2007 and that she had resigned on 25 January 2009. She had confirmed that between 9 December 2008, when the transactions at issue had been sent to the FME, and the date of her resignation, the transactions had been discussed once in a Board meeting, on 19 January 2009, when the director of the FME had announced that a specialist had been appointed to make further inquiries into them; the specialist had handed his report to the FME on 6 March 2009 and the FME had submitted its complaint to the Special Prosecutor on 13 March 2009. Consequently, the matter had never been discussed while Mrs S. had been on the Board. Á.K. further stated that he had not regarded himself as being disqualified from sitting but that he had not wished to sit unless it was clear that the defence had no reservations, and he had therefore requested that the defence be informed of the connection.

36. The Government had also received a statement from Á.K.'s son, Mr K., dated 19 September 2016, confirmed by a former member of the Winding-Up Committee of Kaupþing, according to which Mr K. had worked in Kaupþing's legal department from November 2007 until the bank collapsed in October 2008. Shortly after the appointment of the Resolution Committee, Mr K. had started working for the Committee and he had been head of its legal department from December 2008. After the Resolution

Committee had been discontinued at the end of 2011 and a Winding-Up Committee had been appointed, Mr K. had taken up the position as head of the legal department of the latter committee, a post which he had held until August 2013. Mr K. noted in his statement that when he had taken the position of head of the legal department of the Resolution Committee, it had been decided that cases concerning criminal investigations and actions for damages against former employees would not form part of the work of the legal division of the Resolution Committee, because he had been an employee of Kaupþing before its collapse; the same applied after the Winding-Up Committee was appointed. These cases were entrusted to other employees who reported directly to the Resolution and Winding-Up Committees. Mr K. thus stated that he had not been involved in any way in the case against the applicants or civil actions against them. He added that there had never been any contracts between him and the said committees with an incentive tied to the recovery of Kaupþing's assets. Following his resignation in 2013, he had acted as a consultant to the Winding-Up Board but the consultancy agreement had not related to the present case and had not included performance-related payments. Finally, with regard to the applicants' assertion that the defence had not been notified that he had been head of Kaupþing's legal department, Mr K. observed that he was personally acquainted with all of the defence lawyers in the case and had worked with three of them. Moreover, he had been in contact with two of them while head of the legal department.

II. RELEVANT DOMESTIC LAW

37. The relevant provisions of the Criminal Procedures Act (Law no. 88/2008) are as follows:

Section 6

"1. A judge, including an associate judge, is disqualified from conducting a case if:

...

g. there are other conditions or circumstances which are likely to cast reasonable doubt on his impartiality."

Section 7

"1. 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 chief judge shall ensure the eligibility of expert associate judges."

Section 37

"1. The defence attorney must, as soon as possible, obtain a copy of all case documents[1] relating to his client, as well as facilities to examine other materials in the case. The police, however, can deny a defence attorney access to individual documents or other data for up to three weeks after they were created or came into their custody if it is believed that such access would damage the investigation of the case. The police may deny the defence attorney copies of individual documents while the case is being investigated for the same reason. Denial of access may be referred to a judge.

...

3. In addition, the police may deny the defence attorney access to individual documents and other data during the investigation of the case if the interests of the State or the public are at stake, or if the urgent interests of individuals other than his client are at stake, or if communications with authorities in other countries prevent such access. Such denial of access may be referred to a judge.

...

5. The police must give the defence attorney the opportunity to follow the progress of the investigation in so far as possible. The police are to take into account any suggestions the defence attorney may submit as regards individual investigative actions, unless the police consider such suggestions prohibited or irrelevant."

Section 116

"1. Anybody aged fifteen or older who is subject to Icelandic jurisdiction and is not the defendant or his representative must appear before the court as a witness to respond verbally to questions asked of them about the facts of the case ...

...

4. If the witness is located far from the court or if attending the court would otherwise cause him significant inconvenience, the judge may decide that testimony is to be given during the court session by telephone ot other telecommunications methods, provided that the testimony is given in such a manner that everyone present during the session is able to hear the testimony. This authorisation cannot be applied if the testimony of the witness may be expected to be of substance in the resolution of the case."

Section 120

"1. The prosecutor shall be responsible for summoning witnesses to the court. The defendant may, however, summon witnesses to the court if he so chooses. ...

2. If necessary, the judge shall summon a witness to the court by means of a written summons issued on his own initiative or at the request of either party. The summons shall state the name and address of the witness, the main reasons for the summons, the name of the court, where and when the testimony is to be given and what the consequences may be if the witness does not attend or comply with his duty in other

1. The Supreme Court has established in its case-law that the term "document" in this provision only applies to documents in their traditional form, which is on paper. Data in electronic form is not considered a document within the meaning of the provision but falls under the term "other materials" or "other data".

respects. The prosecutor shall be responsible for the issuance of the summons and such issuance shall be conducted in the same manner as the issuance of the charges, ..."

Section 121

"1. If a witness does not attend the court according to a legitimately issued summons and has not provided a legitimate reason for not doing so, the prosecutor may instruct the police to fetch the witness or to bring the witness before the court at a later date. The police are under an obligation to comply with such instructions from the prosecutor.

..."

38. According to the Criminal Procedures Act, judicial proceedings can be reopened under certain conditions. Section 228 of the Act states that when a District Court judgment has not been appealed or the time limit to appeal has passed, the Committee on Reopening of Judicial Proceedings can approve a request of a person who considers that he or she has been wrongly convicted or convicted of a more serious offence than he or she committed to reopen the judicial proceedings before the District Court, if certain conditions are fulfilled. The conditions are, *inter alia*, that there were serious defects in the processing of the case which affected its conclusion (item d). The State Prosecutor can request a reopening to the advantage of the convicted person if he considers that the conditions in paragraph 1 of section 228 of the Act are fulfilled. In accordance with section 229 of the Act, the request for reopening shall be in writing and sent to the Committee on Reopening of Judicial Proceedings. It shall include detailed reasoning on how the conditions for reopening are considered to be fulfilled. According to section 231 of the Act, the Committee on Reopening of Judicial Proceedings decides whether proceedings will be reopened. If a request for reopening is approved the first judgment remains in force until a new judgment is delivered in the case. Section 232 of the Act states that the Committee on Reopening of Judicial Proceedings can accept a request for the reopening of a case which has been finally decided by the Court of Appeal or the Supreme Court and a new judgment will be delivered if the conditions of section 228 are fulfilled.

THE LAW

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

39. The applicants complained that the Supreme Court had not been independent and impartial, in that (i) the wife of one of its judges had been Vice-Chair of the Board of the FME while it was conducting its investigation into Kaupþing, and (ii) the son of the same judge had had a

strong professional affiliation with the bank, in particular having been employed as head of the legal department of Kaupþing after its collapse and in that capacity having brought large civil claims against two of the applicants. The applicants relied on Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

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

40. The Government contested that argument.

A. Admissibility

1. The parties' arguments

41. The Government maintained that the applicants had failed to exhaust domestic remedies as they had not challenged Á.K. prior to the delivery of the Supreme Court's judgment. While acknowledging that under section 7 § 1 of the Criminal Procedures Act, a judge should on his own initiative evaluate the existence of reasons warranting his withdrawal, so that disqualification was not primarily the responsibility of the parties, the Government pointed out that the applicants had been made aware before the main hearing that the judge in question would sit and that his wife had been a member of the Board of the FME until 25 January 2009. They further maintained that information relating to Á.K.'s son's former position as head of Kaupþing's legal department had been available and could easily have been obtained by the time the case was heard by the Supreme Court. In that connection, the Government pointed out that the son, Mr K., had been an employee of Kaupþing at the same time as two of the applicants were directors of the bank and that, according to his statement of 16 September 2016, he was personally acquainted with all of the defence lawyers, having studied with three of them and worked with two of them. On that basis, and taking into account the small size of Iceland's legal community, the Government considered that Mr K.'s connection with Kaupþing should have been known to the defence. The Government accepted, however, that the applicants had not been aware of Mr K.'s consultancy agreement with the bank from 2013.

42. In the Government's view the applicants had failed to exhaust domestic remedies, as they had not raised these issues before or during the main hearing. The Government maintained that had a request for withdrawal been made, the Supreme Court would have given it due consideration and decided on the matter. They noted in this respect that one of the other judges initially appointed had withdrawn after an observation from the defence. In their view, the explanation provided by the applicants for not objecting to Á.K. was not consistent with the defence's comment on that other judge and they also noted that one of the defence lawyers had

inquired further about the date of Á.K.'s wife's resignation before stating that no observations would be made. The Government concluded that the applicants could not reasonably have assumed that an objection would be in vain or detrimental to their case. While considering that a failure to challenge judges may not in general be regarded as a waiver of the right to an impartial tribunal, the Government maintained that such a failure, without justifiable reasons, constituted non-exhaustion of domestic remedies. Finally, the Government submitted that the use of the extraordinary measure of requesting reopening of the case could not be regarded as exhaustion of domestic remedies.

43. The applicants considered that they had exhausted domestic remedies. They acknowledged that they had not objected to the judge in question despite having been informed of his wife's position but claimed that they had feared a negative bias if they objected after the judge and his colleagues had not raised and decided on the issue on their own initiative. The applicants pointed out that once they had no longer been dependent on those specific judges, they had filed a petition for extraordinary reopening of the case, *inter alia* on the ground of Á.K.'s lack of impartiality. They further noted that in the cases of *Pfeifer and Plankl v. Austria* (no. 10802/84, 25 February 1992, Series A no. 227), and *Oberschlick v. Austria* (no. 11662/85, 23 May 1991, Series A no. 204), the Court had not considered a failure to object to judges on the ground of their lack of impartiality to constitute a waiver of the right to an impartial tribunal.

2. The Court's assessment

44. The Court considers at the outset that a distinction must be drawn between the two branches of the applicants' allegations, and it will accordingly deal with them separately.

(a) Lack of impartiality of Á.K. on account of his wife's membership of the FME Board

45. The Court does not consider it necessary to decide whether an objection to a judge's participation in a trial on account of his alleged lack of impartiality constitutes an effective remedy to be exhausted for the purposes of Article 35 § 1 of the Convention, as it considers that this complaint is in any event inadmissible for the reasons given below.

46. The Court does not consider either that the matter should be regarded as one of waiver of rights in the classic sense of that term as used in its case-law, although it acknowledges that in certain cases similar situations have been examined in the light of the principles relating to waiver (notably *Pfeifer and Plankl* and *Oberschlick*, both cited above). Rather, the issue in the present case is whether the applicants, when faced with a situation in which it was arguable that a judge should be disqualified,

but he was not unequivocally excluded by law, by not objecting to his participation can be said to have accepted that there were no legitimate reasons to doubt the impartiality of the court (see *Smailagić v. Croatia* (dec.), no. 77707/13, §§ 34 and 36, 10 November 2015).

47. In that connection, the Court recalls that in the case of *Zahirović v. Croatia* (no. 58590/11, §§ 31-37, 25 April 2013) it held in similar circumstances to those of the present case that due to the applicant's failure to use the opportunity to submit his complaints about, *inter alia*, a specific judge's alleged lack of impartiality at the trial stage of the proceedings, it could not conclude that the alleged procedural defect complained of had interfered with the applicant's right to a fair trial. It consequently declared the applicant's complaint inadmissible as manifestly ill-founded. It stated in that respect that "when the domestic law offers a possibility of eliminating the causes for concerns regarding the impartiality of the court or a judge, it would be expected (and in terms of the national law required) of an applicant who truly believes that there are arguable concerns on that account to raise them at the first opportunity". A similar situation arose in *Smailagić*, cited above, where the Court concluded that, "given the failure of the applicant to use the opportunity to eliminate the concerns as to the lack of impartiality ... at the relevant time ..., and thus to ensure that his rights were respected, without invoking any relevant reason for such an omission, it cannot be considered that he had legitimate reasons to doubt the impartiality of the court." The Court was therefore prevented from concluding that the alleged procedural defect complained of had interfered with the applicant's right to a fair trial.

48. The Court notes that in the present case the applicants do not dispute that under Icelandic law it was possible for them to challenge Á.K.'s participation on the ground at issue – and indeed, they were given an express opportunity to do so – but that they explicitly stated that they had no objection in that respect. Rather, they submit that they had reservations about making an objection as they feared that this might have negative repercussions, given that neither Á.K. himself nor the Supreme Court bench as a whole had considered it necessary for him to withdraw. However, the Court finds that argument speculative and unconvincing. First, it sees no concrete grounds for fearing that the Supreme Court and Á.K. in particular would have adopted a negative attitude towards the applicants merely on account of an objection to Á.K. Second, it agrees with the Government that the argument is seriously weakened by the fact that a query from the defence led to another judge withdrawing.

49. In the present case, it is clear that the applicants' lawyers, in full knowledge of the circumstances and the implications, explicitly stated that they had no objection to Á.K.'s participation. In these circumstances, the Court considers that their acceptance of that participation when they were given an express opportunity to challenge it constituted an unequivocal

indication that they did not at that time consider Á.K.'s participation to be problematic from the point of view of his impartiality on account of his wife's former position in the FME. Consequently, the complaint must be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3(a) and 4 of the Convention.

(b) Lack of impartiality of Á.K. on account of his son's role as head of the bank's legal department

50. The Court notes that the defense was at no point officially notified of the fact that Á.K.'s son, Mr. K., had held various positions within the legal departments of the bank or of his subsequent role as a consultant. It takes note of the information submitted by the Government that Mr. K. was personally acquainted with all of the defense lawyers in the case and that two of the applicants had been directors of the bank while he was working in its legal department. The Court further takes note of the Government's submission that in the context of a small legal community there is little doubt that Mr. K.'s position was known to the defense. Nevertheless, the Court is unable to accept that such presumed general knowledge is sufficiently certain to put the defense on notice of a potential issue of lack of impartiality of a judge and it cannot therefore agree that the applicants should have objected to Á.K.'s participation on this ground in order to exhaust domestic remedies, even assuming that such an objection constituted an effective remedy to be exhausted for the purposes of Article 35 § 1 of the Convention. It therefore concludes that the complaint cannot be dismissed for non-exhaustion of domestic remedies. Moreover, it is clear that, contrary to the situation relating to Á.K.'s wife, the defense at no time expressly stated that it had no objection to Á.K.'s participation despite his relationship to Mr. K. The Court therefore considers that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Moreover, it is not inadmissible on any other ground and it must therefore be declared admissible.

B. Merits

1. The parties' arguments

51. The applicants made no allegations of personal bias on the part of Á.K. However, they maintained that Á.K.'s objective impartiality was compromised on account of his son's role in three specific situations. First, in their initial submissions the applicants pointed out that the Winding-Up Committee had in January 2013 initiated proceedings in the District Court against Hreiðar Már Sigurðsson and Ólafur Ólafsson for damages on account of their participation in the "Al Thani transaction" and maintained that it could not be denied that the outcome of the criminal case might have a substantial influence on the outcome of those proceedings. Second, the

applicants submitted that following his resignation in 2013, Mr K. had been engaged as a consultant by Kaupþing's Winding-Up Committee until mid-2015, as a consequence of which he had been financially dependent on Kaupþing or at least receiving payment of substantial amounts from the bank, which was the alleged "victim" in the criminal proceedings against the applicants, when the case was heard by the Supreme Court and when its judgment was delivered. The defence had been unaware of the consultancy agreement and in the applicants' view the connection could not be regarded as "remote" as claimed by the Government. Third, the applicants submitted that the fact that Mr K. had been an employee of the bank was a sensitive matter when he was carrying out his duties as head of the legal department following the collapse, and this was underlined by the fact that he had absented himself from meetings of a committee he chaired when cases against former employees were being considered. The applicants accepted that there was no reason to doubt that Mr K. had had nothing to do with the case against them in his capacity as head of Kaupþing's legal department but stressed that the crucial point was how Á.K. must have appeared. In that respect, referring to the case of *Pétur Thór Sigurðsson v. Iceland* (no. 39731/98, 10 April 2003), the applicants submitted that it was obvious that an effective defence of former managers or board members of a collapsed bank had to be ready to include whether certain practices had been tolerated and also whether or not the bank's legal department had participated in or accepted certain practices. Such a defence became extremely difficult, if not impossible, when one of the judges was closely connected to a senior employee in the bank's legal department in the years leading up to its collapse and when the offences charged were committed.

52. The Government asserted firstly that there was no question of any lack of subjective impartiality on the part of Á.K. and that it was only necessary to determine whether the circumstances were such that serious doubts arose as to his objective impartiality. As to the applicants' concerns regarding Mr. K., the Government noted that these related to the claim that as head of Kaupþing's legal department from 2008 to August 2013 he had been responsible for managing a sizeable lawsuit against two of the applicants. They considered that Mr K.'s previous position did not constitute a connection that would in itself disqualify Á.K. from sitting; in the Government's view, in order for fear of lack of impartiality to be objectively justified, it would have to be shown that Mr K. was involved in or had some financial or other ties to the case and that it would have been reasonable to assume that the outcome mattered to him personally. According to the Government, it was not clear how much interest Kaupþing had in the outcome of the case, if any, and even if it might be regarded as having some interest, that interest did not automatically extend to Mr K. as an employee; he was neither the owner nor the main representative of Kaupþing. Moreover, he had resigned from his position around 16 months

before the case was heard by the Supreme Court, and his agreement to continue to work as an adviser to the Winding-Up Committee in a specific matter unrelated to the case or other cases against the applicants was a remote connection. The Government referred to the statement from Mr K. which they had submitted and which they regarded as evidence that he had at no point been involved in any cases against the applicants, criminal or civil. Moreover, the outcome of the criminal case could not have affected him financially or otherwise. In conclusion, the Government maintained that the applicants could not entertain legitimate doubts as to Á.K.'s impartiality on this account. They referred in that respect to *Walston v. Norway* ((dec.), no. 37372/97, 11 December 2001).

53. The Government acknowledged that appearances may be of a certain importance when assessing objective impartiality but pointed out that the only evidence cited by the applicants as to Mr K.'s substantial connection to the case was an announcement of his resignation from Kaupþing and a press article about supposed fixed payments that several current and former employees of Kaupþing would receive if the bank were to reach a composition agreement. In the Government's view, this information alone could not be regarded as sufficient to raise questions in the minds of the applicants as to a lack of impartiality on the part of Á.K.

54. The Government added that they did not agree with the applicants' assertion that Mr K.'s consultancy agreement with Kaupþing had made him "financially dependent" on it and that he was to receive "substantial amounts" and maintained that there was no evidence of that. At the time the case was heard by the Supreme Court, Mr K. held a position in an organisation unrelated to Kaupþing and the consultancy agreement had nothing to do with the case or the applicants and the payments to be made had no relation with the outcome of the case. There was no indication that the connection had been capable of putting financial pressure on Á.K. Finally, the Government submitted that nothing in the case file indicated that the defence strategies referred to by the applicants were an option.

2. The Court's assessment

(a) The general principles

55. For the general principles relating to the impartiality of a tribunal, the Court refers to the judgment in the case of *Denisov v. Ukraine* [GC] (no. 76639/11, §§ 61-63, 25 September 2018; see also *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, §§ 145-49, 6 November 2018, and in the criminal context, *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 118-21, 15 December 2005):

> "61. As a rule, impartiality denotes the absence of prejudice or bias. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the

judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say, by ascertaining whether, quite apart from the personal conduct of any of its members, the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, among other authorities, *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009, with further references).

62. However, there is no watertight division between subjective and objective impartiality, as the conduct of a judge may not only prompt objectively held misgivings as to the tribunal's impartiality from the point of view of the external observer (the objective test) but may also go to the issue of the judges' personal conviction (the subjective test) (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 119, ECHR 2005-XIII). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III).

63. In this respect, even appearances may be of a certain importance, or in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public (see *Morice v. France* [GC], no. 29369/10, § 78, ECHR 2015)."

56. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*Dorozhko and Pozharskiy v. Estonia*, nos. 14659/04 and 16855/04, § 51, 24 April 2008; see also *Kyprianou*, cited above, § 119, with further references). As concerns the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise justified doubts as to his or her impartiality. 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 person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (*Dorozhko and Pozharskiy*, cited above, § 52, referring to *Micallef*, cited above, § 74; see also *Ferrantelli and Santangelo v. Italy*, 7 August 1996, § 58, *Reports* 1996-III, and *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII).

57. The objective test has been applied in numerous cases where a judge had either been involved in the same proceedings in a different capacity or had exercised dual functions in separate proceedings involving one of the parties or had links with third parties who had been or were connected in some way with the proceedings.

58. Thus, in the case of *Wettstein*, cited above, the Court held that there had been a violation of Article 6 § 1 of the Convention in circumstances where the judge in question had acted in separate appeal proceedings as representative of the party's opponent. It laid emphasis on the fact that the proceedings, although there was no material link between them, had been pending simultaneously, so that there was an overlap in time. Conversely, in the case of *Puolitaival and Pirttiaho v. Finland* (no. 54857/00,

23 November 2004), the Court held that there had been no violation where the (part-time) appeal court judge in question was a partner in the firm which had represented the appellant's opponent in separate proceedings. The Court distinguished the case from *Wettstein* essentially on the basis that the dual functions of judge/representative had not overlapped in time and although the two sets of proceedings had been contemporaneous for a year and had been pending simultaneously before the Court of Appeal for two or three months, the judge's role as a representative during that time had been limited to drafting and signing the notice of appeal in the first set of proceedings, the case having been otherwise handled by another lawyer. In *Steck-Risch v. Liechtenstein* (no. 63151/00, 19 May 2005), the Court considered that the fact that a Constitutional Court judge's partner in a law firm had been the presiding judge when the case was examined by the Administrative Court did not constitute grounds to justify objective fears as to lack of impartiality, taking into account in particular that neither of them had exercised dual functions, that their relationship was purely professional without any interdependence and that there was no indication that they had shared any substantial information about the applicant's case. Finally, in *Mežnarić v. Croatia* (no. 71615/01, 15 July 2005), M.V., one member of a panel of five judges of the Constitutional Court which had dismissed the applicant's constitutional complaint in December 2000 had represented the other party at an early stage of the same proceedings, some nine years before, his participation being however limited to lodging one set of submissions, responding to the applicant's arguments; he had subsequently been replaced by his daughter, who had acted for the other party until 1996. The Court concluded that there had been a violation of Article 6 of the Convention. While it recognised that M.V.'s previous involvement had been both minor and remote in time, and that his dual function had in fact related to different legal issues, it placed decisive weight on the fact that M.V. had acted in both capacities in the course of the same proceedings. This, reinforced by the involvement of his daughter, had created a situation which was capable of raising legitimate doubts about his impartiality.

59. With regard to the specific issue of a judge's relative being connected in one way or another to the proceedings with which the judge is dealing, the Court recalls that in the case of *Dorozhko and Pozharskiy*, cited above, it found that there had been a violation of Article 6 § 1 of the Convention on account of the lack of objective impartiality of a judge whose husband had headed the criminal investigation leading to the trial over which she had presided, notwithstanding the Government's assertion that his role had been of a formal nature. Similarly, in *Huseyn and Others v. Azerbaijan* (nos. 35485/05, 45553/05, 35680/05 and 36085/05, 26 July 2011), a violation was found on account of the fact that a judge's brother had initially been a member of the investigation team working on the applicants' criminal case and that they had therefore been *de facto* involved

in the same criminal case concerning the same defendants and the same criminal charges, notwithstanding any regrouping of defendants into separate sets of proceedings and formal reassignment of case numbers that had taken place in the meantime; it was also taken into account that the majority, if not all, of the main incriminating evidence subsequently used against the applicants at the trial had been collected by the investigation team prior to the date on which the brother had left the investigation. Moreover, the fact that the son of another judge had been an employee of the State Prosecutor's Office and directly subordinate to the prosecutor who had served as a head of the investigation team in the applicants' case, despite never having been assigned to work on the case, and however insignificant and remote the link of the judge with the prosecution might have been considered if viewed separately, in the specific context of the case at least compounded the justified fears as to lack of impartiality arising from the situation of the first judge. Finally, in the case of *Pétur Thór Sigurðsson*, cited above, the Court found a violation of Article 6 § 1 on the ground that, irrespective of whether the Supreme Court judge in question or her husband had any direct interest in the outcome of the case between the applicant and the National Bank, "there was at least the appearance of a link between the steps taken by [the judge] in favour of her husband and the advantages he obtained from the National Bank", so that "the judge's involvement in the debt settlement [concerning her husband], 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."

(b) Application of those principles to the present case

60. The Court observes firstly that neither Á.K. nor Mr K. exercised dual functions in the same proceedings and secondly that neither of them was directly involved in both sets of proceedings. Thus, unlike in the cases referred to above, Mr K. did not participate in any capacity in the criminal proceedings in which his father sat as a Supreme Court judge. Nevertheless, Mr K., in his role as head of the bank's legal department, had a connection with the civil proceedings brought by the bank against two of the applicants. Even if he had no direct involvement in those proceedings, which according to his letter submitted by the Government were dealt with outside the legal department, and even if he had no personal or financial interest in the outcome of the proceedings, his position as a senior legal adviser within the bank meant that he could at least have appeared to retain a certain formal responsibility for the proceedings. Moreover, such a perception could have been compounded by the fact that he was chairman of the committee set up to deal with, *inter alia*, damages claims against former directors of the bank, notwithstanding his efforts to distance himself from them by absenting

himself from meetings where cases against former staff members were to be discussed. In the Court's view, the internal measures taken within the bank to avoid any direct involvement of Mr K. in civil proceedings arising out of the bank's collapse were not sufficient to make up for the fact that, for the purposes of appearances, he was formally responsible for the legal affairs of the bank at a time when it was pursuing a civil action against two of the applicants. On that basis, the applicants could legitimately have regarded him as a representative of their "opponent" – the bank – in the civil proceedings. While the bank was not a party to the criminal proceedings and the proceedings were not materially related, the charges clearly concerned acts of which the bank was a victim and the two sets of proceedings had their origins in the same events (see, in that connection, *Indra v. Slovakia*, no. 46845/09, 1 February 2005, in which the Court found that there had been a violation of Article 6 § 1 on account of the fact that the judge in question had previously sat in related proceedings, considering that it was necessary to take into account that both proceedings referred to the same set of facts). Indeed, from the applicants' standpoint they were defendants in two sets of parallel proceedings in which their respective criminal and civil responsibility for the essentially same conduct was at issue.

61. It is true that Mr K. no longer held any position in the bank when the case was before the Supreme Court, of which his father was a judge (cf. *Walston*, cited above, where the judge in question had left the employment of the bank which was a party to the proceedings before him five years earlier). Nevertheless, Mr K worked at the legal department of the bank from 2007 and was subsequently head of the legal departments of its Resolution Committee and Winding-Up Committee, from 2008 until 2013, and thus during the time of the criminal investigation and the trial before the District Court, as well as during the civil proceedings, and he continued in the role of consultant to the bank while the case was before the Supreme Court. In these circumstances, the Court considers that the family link between Mr K. and Á.K. was sufficient to create objectively justified fears as to Á.K.'s impartiality as a judge in the criminal appeal proceedings against the applicants. Á.K. was acting as a judge in a criminal case concerning transactions which had taken place within a bank with which his son had had close connections as a senior employee both before and after its collapse and which had been the opposing party in civil proceedings brought against two of the applicants while he was head of its legal department. Moreover, the fact that Mr K. was in receipt of payments as a consultant for the bank after having left its employment is an additional element which must be taken into account, especially in view of the fact that the consultancy was contemporaneous with the Supreme Court proceedings. Finally, the Court considers that all of the applicants could legitimately harbour doubts as to Á.K.'s objective impartiality, although the civil proceedings in question were brought against only two of them.

62. It follows that there has been a violation of Article 6 § 1 of the Convention in this respect.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3(B) OF THE CONVENTION

63. The applicants complained that they had not been allowed adequate time and facilities for the preparation of their defence and that they had not had a fair hearing because they had not had access to all the evidence in the case against them. They submitted in particular that they had been denied access to the documents of the case as well as to a list of documents, during both the investigation and the trial at both instances. They maintained that no one had reviewed the prosecution's cherry-picking of the documents submitted to the court and that they had been denied the possibility of searching using the electronic system applied. In their view, the principle of equality of arms required that they should have had the same opportunities as the prosecution to access and select evidence from the collection of documents gathered by the police during the investigation. They relied on Article 6 §§ 1 and 3(b) of the Convention, which is so far as relevant read as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal ...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (b) to have adequate time and facilities for the preparation of his defence ..."

64. The Government contested that argument.

A. Admissibility

65. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

66. The applicants submitted that the prosecution had applied advanced search facilities, using the Clearwell software, to identify evidence from the "full collection of data" – which was "enormous in scope" – which it wished to examine more closely in order to choose which parts it would

submit to the court. The applicants and their lawyers, by contrast, had not been allowed to conduct their own searches, although this would have been possible with very limited effort, the software being easy and fast to apply. Moreover, access to lists of the documents "tagged" as a result of the prosecution's search had also been refused. As a result, the defence had been denied the right of access to evidence and the principle of equality of arms had been violated. The defence had been entirely dependent on access being granted by the prosecution, as it had had no other way of obtaining access to any of the transaction documents or indeed any other Kaupþing documents.

67. The applicants further maintained that the evaluation of the evidence identified through the Clearwell search had been made by the prosecution alone, the defence being excluded from this "filtering" process. According to them, the defence was "to some extent invited in" once this assessment had taken place, lists of the "investigation documents" having been provided to the defence. However, while this had enabled the defence to identify evidence which it wished to be submitted to the court, since the prosecution had already selected evidence to be submitted there was practically nothing further for the defence to request. In the applicants' view, although they had access to the "investigation documents", it was far too late and insufficient at that stage to invite the defence to examine evidence; in the earlier search and selection process evidence that might have been of importance to the defence had been left in the dark and had never been known to or assessed by the defence.

68. In the applicants' view, a *de facto* monopoly of the prosecution in using advanced digital search facilities, excluding the defence from searching with keywords or combinations of potential importance to the defence, would undermine the fundamental rights of the accused. For the applicants, if the prosecution feared that the data contained sensitive personal information or matters involving public interests, it would have to filter such data and the defence would have to have an opportunity to contest the filtering. It was utterly disproportionate to deny the defence any access at all on account of such fears. The applicants maintained that in the present day the defence was very often dependent on the cooperation of the police, as it could only to a very limited extent conduct its own investigations and had to request the police to hear witnesses, conduct technical inspections and go through vast quantities of documents not accessible to the defence. The applicants submitted that the practice of the Icelandic police and courts could lead to substantially wrong decisions in serious criminal cases, and referred in that connection to another case arising out of the financial crisis, in which the incorrectness of the prosecution's claim that a loan had been granted without security had only been discovered after the defence had finally been allowed to search in certain e-mails.

69. In conclusion, the applicants maintained that they had been denied access to the "full collection of data" (including the data "tagged" using the Clearwell searches but not included in the investigation file), and that there had been no proper judicial review of the scope, necessity and proportionality of the limitation.

70. The Government maintained that the applicants had had access to all evidence submitted in court by the prosecution and that at no stage of the trial had the prosecution referred to any evidence which the applicants had not had a chance to review. Furthermore, given the length of the proceedings, the applicants had had adequate time to review and assess that evidence before the main hearing. In addition, the applicants had been afforded access to all the "investigation documents", that is the materials which were regarded by the Special Prosecutor as relevant during the investigation and which were marked as part of the investigation file. The applicants had also been granted access to all seized e-mails that had passed through their own accounts and their recorded phone calls that were still stored by the Special Prosecutor. Finally, the applicants' requests during the proceedings before the District Court for submission of certain specified documents had been met to the extent that they were held by the Special Prosecutor or were easily available. There was nothing to indicate that the prosecution had withheld material evidence in its possession, and the applicants had not specified any such evidence, which distinguished the case from *Natunen v. Finland* (no. 21022/04, 31 March 2009) and *Rowe and Davis v. the United Kingdom* ([GC], no. 28901/05, 16 February 2000).

71. The Government accepted that the applicants had not been given access to the "full collection of data", that is all data gathered during the investigation and held by the Special Prosecutor. In that connection, they submitted that the Special Prosecutor had gathered masses of data, including by the use of intrusive measures. The collection of data had been exceptionally extensive, as the Special Prosecutor had at the time been investigating more than one case relating to Kaupþing. The Government emphasised that included in the Clearwell folders were a multitude of documents unrelated to the case, and among the seized items were hard drives containing e-mails, personal drives and records of phone conversations of numerous Kaupþing and KBL employees, as well as the personal laptops of several individuals. The data in question were by their nature likely to contain sensitive personal information, such as financial information, and giving access would have violated the privacy of other individuals. The greater part of the "full collection of data" had not been regarded as relevant to the case by the investigators: thus, the prosecution had submitted some 6,300 pages to the District Court, whereas the e-mails were estimated to number around 20 million.

72. In the Government's view, data irrelevant to a case could not be automatically defined as evidence, despite having been gathered by the

police during an investigation. In any investigation the police could obtain access to all sorts of data and some kind of assessment had to take place before data became part of an investigation file; it was normal that the initial assessment of what constituted potential evidence was made by the investigating or prosecuting authorities. The Government observed that in the light of the legal obligations resting on those authorities to take into consideration facts both for and against a suspect, that assessment was already up to a certain point entrusted to them. The Government also considered that the need for such an assessment was even stronger when intrusive measures had been used, in particular when seized items such as electronic devices had to be searched further for information but were likely to contain data unrelated to the case.

73. The Government likened the situation to a search of premises of a third party. In their view, had the Special Prosecutor gone to the premises of Kaupþing or KBL and carried out the necessary searches in their computer systems there, there would have been no question that the applicants would only have had access to those documents extracted and defined as investigation documents. Thus, although the searches had taken place in the premises of the Special Prosecutor, the information obtained could not be regarded as part of the investigation file and accessible to the applicants without limitation. Allowing the defence to conduct a search independently would have equated to giving it investigative authority which by law was restricted to the police. During the investigation the defence could have requested that the Special Prosecutor search for specific information related to the case and such a request would have had to be considered pursuant to section 37 § 5 of the Criminal Procedures Act.

74. The Government noted that, as established in the Court's case-law, the right to access evidence is not absolute and in certain circumstances limitations can be necessary, such as withholding evidence to preserve the fundamental rights of another individual or to safeguard important public interests. While the Government did not consider that evidence had been withheld in the present case, they submitted that the Special Prosecutor's decision to deny access to the "full collection of data" was based on similar considerations, in particular the protection of the rights of other individuals.

75. The Government considered that for the Special Prosecutor to be able to determine whether access should be allowed to data outside the investigation file, the applicants would have had to specify further which data they wanted access to and give reasons for that access. However, it appeared that the only specific requests made by the defence which had been denied were to access the collections of e-mails and tapped telephone calls of individuals other than the applicants which had not been put in the investigation file. It was thus unclear whether the Special Prosecutor would, or would not, have allowed access to other specified data.

76. The Government referred to the safeguards incorporated in section 37 §§ 1 and 3 of the Criminal Procedures Act, providing that the refusal of the investigating authorities of a request for copies of case documents or facilities to examine other materials can be referred to a judge. In that respect, the Government noted that the defence could at any stage of the proceedings have asked the District Court to rule on the denial of access to the "full collection of data" or to any other specific data to which they had not been granted access. However, they had failed to do so, as a result of which no assessment of the limitation of their right of access had ever been made by the judicial authorities. The Government recognised that the defence had on at least three occasions made requests to the court to obtain copies of certain other documents and materials, all of which had been rejected. As to other limitations on access, the Supreme Court had stated that "the basic condition must be satisfied that a demand concerning [access to documents] has been referred to the courts". This possibility of obtaining a judicial assessment of the matter distinguished the case from *Natunen*, cited above, and *Fitt v. the United Kingdom* ([GC], no. 29777/96, ECHR 2000-II). Furthermore, according to the Government the case file did not indicate that before the Supreme Court or at any stage of the proceedings the applicants had pointed to any specific evidence which they believed was being withheld and that could have led to their exoneration.

77. As to the courts' rejection of the defence requests for copies of certain documents, the Government submitted that this had not restricted the applicants' rights under Article 6, as this "aggregate collection of data" had been accessible to the defence in the premises of the Special Prosecutor and the defence had had the opportunity to ask for it to be submitted as evidence after reviewing it. It was on this basis that the District Court had rejected the applicants' request on 29 May 2012.

78. The Government objected to the applicants' contention that the Special Prosecutor had made any statements about allowing access to all gathered data, maintaining that his statement and the District Court's ruling were clear that the offered access related to the specified data indicated by the defence. That access had indeed been granted. Moreover, the District Court's ruling rejecting the request for copies of certain data could not be regarded as ordering the Special Prosecutor to allow access to the "full collection of data". While the court had made a statement about the general obligation of the prosecution to grant the defence access to data gathered by the police, that statement had clearly been made in connection with the defence's requests for copies of certain data.

79. In its ruling of 26 March 2013 the District Court had rejected the defence's request for copies of specified summary lists of seized data on the ground that such summaries did not exist and the defence's right to obtain copies of documents in a case did not extend to the police being obliged to prepare documents at the request of the defence. While the Supreme Court

had held that the ruling could not be appealed against, it had nonetheless examined whether the refusal of the police had constituted a breach of the applicants' rights and had concluded that it had not. In the Government's submission, the refusal to provide specified summaries did not constitute a denial of access to evidence held by the police; furthermore, it was in fact impossible to make or review the requested summary list, as a summary list of only the e-mails would have constituted around 400,000 pages, and a summary list of documents in the Clearwell folders would have totalled around 15,000 pages. Allowing a new search would have meant conducting a part of the investigation again.

80. In the Government's view, the detailed files on the seized items which were among the evidence submitted to the court gave a sufficient overview of the data collected by the police and their rough content, and by reviewing them, with the knowledge the defence had of the case, the defence could easily have formed more specific claims for access to certain data.

81. The Government disputed the applicants' statement that the lack of access to the collected documents had been repeatedly brought to the courts' attention without them being heard on the matter, pointing out that the courts had examined the issue when it had been brought before them by the proper means. The applicants could not have expected the courts to order the Special Prosecutor to allow access to the "full collection of data" without such a request being brought before them. Moreover, the applicants had not pointed to specific data, documents or materials being held from them, contrary to the situation in *Leas v. Estonia* (no. 59577/08, 6 March 2012). Instead, the defence had insisted on access to the "full collection of data", which was impossible to comply with.

82. As to whether the lack of access to the "full collection of data" was sufficiently counter-balanced by the procedures followed by the judicial authorities, the Government reiterated that the applicants had had the chance to review and comment on all the evidence adduced by the prosecution and that there had never been any refusal by the courts to order disclosure of certain evidence. The defence had had an opportunity equal to that of the prosecution to submit evidence and its requests to the prosecution to submit certain evidence had been satisfied when possible. The applicants had not pointed to any documents that the Special Prosecutor had failed to provide that would have affected the outcome of the case. In addition to the submitted evidence, the defence had been provided with a detailed list of other investigative documents which were available on request and among the submitted evidence had been overviews of seized items and their rough content, giving the applicants an opportunity to at least delimit their claims for access to more specific data.

83. The Government submitted that the principle of equality of arms did not entail that the defence should be given the same powers as the police to

investigate criminal cases. The point was not how easy a given investigation method was but rather how far the accused should be afforded the same authorities and devices as the police and prosecution to search in collections of sensitive and unrelated data belonging to and regarding other individuals. Furthermore, the Government noted that there was nothing to indicate that the applicants had requested or been repeatedly denied the right to conduct their own search using Clearwell, but were in any event of the opinion that the Special Prosecutor could not have acceded to such a request, at least not without a court order. To compensate for the defence's lack of investigative authority, section 37 § 5 of the Criminal Procedures Act provided defence lawyers with the possibility of making suggestions as to investigative actions, and the applicants' lawyers could thus have requested that the seized data be searched for certain information or using specific keywords. A refusal could have been brought before the District Court. However, the case file did not disclose any such request. The defence had requested, *inter alia*, copies of lists of documents that would be found by using a certain keyword search but in order to comply with that request the Special Prosecutor would have had to import all data in the Clearwell folders into the system again and run a fresh search from which a list could be generated. The defence's request for such lists had been rejected by the District Court. In the absence of arguments from the defence specifying what evidence could be found in the lists, the Government did not consider that that rejection amounted to a denial of access to evidence.

84. The Government denied that summary lists of the documents in the three folders existed; such lists had not been made at the time of the searches and the data were no longer in the Clearwell system when the defence requested lists. The Government were unable to elaborate on the case referred to by the applicants, as it was pending on appeal before the Supreme Court but in their view the crucial point in that case was that the defence had asked for access to specific e-mail accounts. With regard to the applicants' suggestion that the prosecution should filter data if there were fears it contained personal information, the Government noted that this was in fact what had happened in the present case. The defence could have contested that filtering before the District Court. In conclusion, the Government maintained that to regard all seized electronic data automatically as evidence would be highly impractical, as the police would be unable to search collections of data without the entire collection becoming available to the accused.

2. The Court's assessment

(a) The general principles

85. The principles relating to the right of the defence to have access to evidence in the possession of the prosecution were reiterated in the

judgment of *Van Wesenbeeck v. Belgium* (nos. 67496/10 and 52936/12, §§ 67-68, 23 May 2017), as follows:

> "67. In this context the Court reiterates that it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and to comment on the observations filed and the evidence adduced by the other party (see *Jasper v. the United Kingdom* [GC], no. 27052/95, § 51, 16 February 2000; *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II; *Fitt v. the United Kingdom* [GC], no. 29777/96, § 44, ECHR 2000-II; *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46 and 48, ECHR 2004-X; and *Öcalan v. Turkey* [GC], no. 46221/99, § 146, ECHR 2005-IV). In addition Article 6 § 1 requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see *Jasper*, *Rowe and Davis*, *Fitt*, and *Edwards and Lewis*, cited above).
>
> 68. That having been said, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see *Jasper*, cited above, § 52; *Rowe and Davis*, cited above, § 61; *Fitt*, cited above, § 45; and *Edwards and Lewis*, cited above, §§ 46 and 48; see also *Al-Khawaja and Tahery*, cited above, § 145)."

86. The Court further specified in *Natunen*, cited above (§§ 42-43) that:

> "42. ... Article 6 § 3 (b) guarantees the accused "adequate time and facilities for the preparation of his defence" and therefore implies that the substantive defence activity on his behalf may comprise everything which is "necessary" to prepare the main trial. The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings (see *Can v. Austria*, no. 9300/81, § 53, Commission's report of 12 July 1984, Series A no. 96, and *Moiseyev v. Russia*, no. 62936/00, § 220, 9 October 2008). Furthermore, the facilities which should be enjoyed by everyone charged with a criminal offence include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings (see *C.G.P. v. the Netherlands* (dec.), no. 29835/96, 15 January 1997, and *Galstyan v. Armenia*, no. 26986/03, § 84, 15 November 2007).
>
> 43. Failure to disclose to the defence material evidence, which contains such particulars which could enable the accused to exonerate himself or have his sentence reduced would constitute a refusal of facilities necessary for the preparation of the defence, and therefore a violation of the right guaranteed in Article 6 § 3 (b) of the Convention (see *C.G.P.*, cited above). The accused may, however, be expected to give specific reasons for his request (see *Bendenoun v. France*, 24 February 1994, § 52,

Series A no. 284) and the domestic courts are entitled to examine the validity of these reasons (see *C.G.P.*, cited above)."

(b) Application of those principles to the present case

87. As the requirements of Article 6 § 3 are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 § 1 of the Convention, the Court will examine the complaint from the point of view of these two provisions taken together (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 90, 18 December 2018).

88. The Court notes that there were several collections of documents/data: the "full collection of data" which encompassed all the material obtained by the prosecution (and included as a sub-category data "tagged" as a result of the Clearwell searches using specified keywords but not subsequently included in the investigation file); the "investigation documents", identified from that material by means of further searches and manual review as potentially relevant to the case; and the "evidence in the case", that is the material selected from the "investigation documents" and actually presented to the District Court by the prosecution. It is undisputed that the defence was provided with the "evidence in the case" and thus no issue arises of use of evidence by the prosecution which was not disclosed to the defence. It is also undisputed that the defence was given an opportunity to consult the "investigation file" containing material which had not been submitted to the court, a list of which was submitted in the District Court proceedings; while the Special Prosecutor had refused to provide copies of some of that material, the Supreme Court confirmed that it was sufficient that the defence had access to it in his premises. The Court therefore considers that no issues of denial of access to evidence arise in this respect.

89. The applicants' complaint focuses rather on the fact that the defence did not have access to the "full collection of data". While the Government do not consider that data to constitute "evidence" for the purposes of the case, the applicants maintain that it may have contained evidence in their favour and that the denial of access to it breached the principle of equality of arms, in particular as the prosecution selected the material it considered relevant to the case without being subject to any control. They maintain moreover that there were no technical obstacles to allowing them to conduct their own search of the "full collection of data" using the Clearwell technology. The Government, on the other hand, refer to the mass of data involved and to the confidential nature of certain information, as well as to the failure of the applicants to specify what evidence might have been relevant to their defence. The issue in the case is thus whether the defence had a right to obtain access, on the one hand, to the mass of information collected indiscriminately by the prosecution and not included in the

investigation file, and on the other hand to the "tagged" data obtained by Clearwell searches, in order to identify potentially disculpatory evidence.

90. The Court accepts that by its nature the "full collection of data" inevitably included a mass of data which was not *prima facie* relevant to the case. Moreover, it can accept that when the prosecution is in possession of a vast volume of unprocessed material it may be legitimate for it to sift the information in order to identify what is likely to be relevant and thus reduce the file to manageable proportions. It considers nevertheless that in principle an important safeguard in such a process would be to ensure that the defence is provided with an opportunity to be involved in the definition of the criteria for determining what may be relevant. In the present case, however, the applicants did not point to any specific issue which they suggested could have been clarified by further searches, and in the absence of such specification – which was open to them under section 37 § 5 of the Criminal Procedures Act – the Court has difficulty in accepting that a "fishing expedition" of this kind would have been justified. In that respect, the data in question were more akin to any other evidence which might have existed but had not been collected by the prosecution at all than to evidence of which the prosecution had knowledge but which it refused to disclose to the defence. Thus, while the Court reiterates that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused, and indeed the prosecution in the present case had a duty under domestic law to take into consideration facts both for and against a suspect – in line with the Court's own case-law –, the prosecution was not in fact aware of what the contents of the mass of data were, and to that extent it did not hold any advantage over the defence. In other words, it was not a situation of withholding evidence or "non-disclosure" in the classic sense.

91. The situation is different with regard to the data "tagged" as a result of the initial Clearwell searches. These data were reviewed by the investigators, both manually and by means of further Clearwell searches, in order to determine which material should be included in the investigation file. While here again the excluded material was *a priori* not relevant to the case, this selection was made by the prosecution alone, without the defence being involved and without any judicial supervision of the process. In that connection, the Court recalls that "a procedure, whereby the prosecution itself attempts to assess the importance of concealed information to the defence and weigh this against the public interest in keeping the information secret, cannot comply with the above-mentioned requirements of Article 6 § 1" (*Rowe and Davis*, cited above, § 63). Moreover, the defence was denied lists of the documents – and in particular the "tagged" documents – on the ground that they did not exist and that there was no obligation to create such documents, and reference was also made to the technical obstacles to remigrating the data and conducting new searches, given the

volume in question. As to the denial of lists, the Court has no reason to question the finding of the Supreme Court that under domestic law there was no obligation on the prosecution to create documents which did not already exist. It notes, however, that it appears that further searches in the data would have been technically rather straightforward and it considers that in principle it would been appropriate for the defence to have been afforded the possibility of conducting – or having conducted – a search for potentially disculpatory evidence. While it is sensitive to the privacy issues raised by the Government, the Court does not consider that there were insurmountable obstacles in that respect. It thus finds that any refusal to allow the defence to have further searches of the "tagged" documents carried out would in principle raise an issue under Article 6 § 3(b) with regard to the provision of adequate facilities for the preparation of the defence.

92. That said, the Court finds that despite frequent complaints to the prosecution about lack of access to documents, the applicants do not appear at any stage to have formally sought a court order under section 37 § 3 of the Criminal Procedures Act for access to the "full collection of data" or for further searches to be carried out, nor do they appear to have suggested further investigative measures – such as a fresh search using keywords suggested by them – under section 37 § 5 of the same Act. Thus, the Supreme Court, in its judgment, dismissed the applicants' claims in this respect, referring to the requirement that "the basic condition must be satisfied that a demand concerning [access to documents] has been referred to the courts". This possibility of review by a court was, however, an important safeguard in determining whether access to data should be ensured. The Court takes note in this connection of the Government's submission that among the evidence submitted to the District Court were overviews of the seized items and their rough content. In these circumstances, and bearing in mind that the applicants did not provide any specification of the type of evidence they were seeking, the Court is satisfied that the lack of access to the data in question was not such that the applicants were denied a fair trial overall.

93. The Court therefore concludes that there has been no violation of Article 6 §§ 1 and 3(b).

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3(D) OF THE CONVENTION

94. The applicants complained that neither the District Court nor the Supreme Court had heard Al Thani or Sultan as witnesses and that insufficient efforts had been made to summon them or to obtain their testimony via video or telephone. They also complained that the statements taken from those individuals during the investigation had been totally

disregarded. They relied on Article 6 §§ 1 and 3(d) of the Convention, which in so far as relevant read as follows:

> "1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by [a] ... tribunal...
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ..."

95. The Government contested those assertions.

A. Admissibility

96. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

97. The applicants maintained that the witnesses Al Thani and Sultan were key defence witnesses who could have demonstrated that the former had invested in Kaupþing for legal and proper business purposes. Al Thani had been a key player in the transactions at issue and the precise role of each participant could not be understood without his testimony, while Sultan, as his close adviser, had also played an important role in the transactions. In particular, it was likely that they would have confirmed that the company owned by Al Thani was the sole owner of the shares in Kaupþing, contrary to the prosecution's allegation that Ólafur Ólafsson was a co-investor. However, neither of them had been effectively heard in that connection. The applicants had never been given an opportunity to question them during the trial, and according to the applicants the attempts to hear them as witnesses had been half-hearted and insufficient. Moreover, the defence had not been invited to participate in the interviews with Al Thani and Sultan in London but had only learned of them later. In the applicants' view, the police had failed to ask them crucial questions about the nature of Al Thani's interest in Kaupþing and the purpose of his investment.

98. The applicants emphasised that after Al Thani and Sultan had declined the invitation to testify – sent by e-mail to his lawyer in London – no further attempts had been made to have them examined. The applicants maintained that the defence had pushed very hard and consistently on this

matter, raising the question of these witnesses several times. In their view, it could have been arranged for the two witnesses to be questioned by the prosecution and the defence at Al Thani's home in London or at an Embassy. Alternatively, the prosecution could have requested the District Court to summon the witnesses under section 120 § 2 of the Criminal Procedures Act, or the court could have summoned them on its own initiative. Although this would not have had any legal effect outside Icelandic jurisdiction, it would have highlighted the importance of their presence, much more so than an informal e-mail. In sum, the Icelandic authorities had not made all reasonable efforts to secure the attendance of the two witnesses. The applicants referred in this respect to the Court's findings in the cases of *Schatschaschwili v. Germany* ([GC], no. 9154/10, 15 December 2015), *Mirilashvili v. Russia* (no. 6293/04, 11 December 2008), and *Klimentyev v. Russia* (no. 46503/99, 16 November 2006), in which the Court had found the efforts made to be reasonable.

99. In conclusion, the applicants stressed that the complaint related not to the use of statements of absent witnesses but rather to the absence of two witnesses whom the defence wished to examine and who could possibly have been persuaded to testify in an alternative way than appearing before the court.

100. The Government maintained that the criminal proceedings against the applicants had complied with Article 6 §§ 1 and 3(d) of the Convention despite the fact that the defence had not had an opportunity to question the witnesses Al Thani and Sultan during the trial. The Government accepted that the principles established in the cases of *Schatschaschwili*, cited above, and *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, 15 December 2011), were applicable but considered that the case differed in fundamental aspects from those cases. In particular, the applicants did not complain that the statements of the absent witnesses had been used as evidence against them – and there was no indication that their conviction was based on those statements, even in part – but rather that the witnesses could have given evidence leading to their exoneration, so that the statements *should* have been taken into consideration. In that respect, the Government maintained that the witnesses were not only prosecution witnesses and that the applicants could have called them as defence witnesses.

101. Proceeding on the basis of the three-step test laid down in *Al-Khawaja*, the Government firstly maintained that there was a good reason for the non-attendance of the two witnesses and that the prosecution had made all reasonable efforts to have them testify before the District Court. Pursuant to section 120 of the Criminal Procedures Act, the prosecutor was responsible for summoning witnesses to court but the defendant could also do so. Moreover, a judge could summon a witness by

means of a written summons issued on his or her own initiative or at the request of either of the parties.

102. The Government recalled that the Special Prosecutor had summoned the two witnesses by an e-mail sent to their lawyer in the United Kingdom, and maintained that this was in accordance with domestic law and standard practice. The Special Prosecutor had moreover made it clear to Sultan that the informal statements would have very little evidential value and had emphasized the importance of the witnesses giving testimony before the court. In addition, the witnesses had been informed of the possibility of giving evidence by telephone. Nevertheless, they had not wished to take part in the proceedings. The Government maintained that in the light of that position, there had been no further reasonable means for the prosecution or the court to enable the applicants to examine the witnesses, both Qatari citizens living in Qatar, and enjoying diplomatic status, in court. In particular, a summons from the court would not have had any legal effects outside Icelandic jurisdiction and there were no international treaties or other mechanisms to which the prosecution or the court could have resorted for legal assistance.

103. The Government added that the applicants had not made any comments or demands in connection with the absence of the witnesses when it was announced at the hearing on 7 March 2013 that the witnesses had declined to attend, nor had the matter been brought up before the main hearing in November 2013. Indeed, at no stage had the applicants made any formal requests regarding the witnesses. As the applicants submitted that the testimony of those witnesses was material for the defence, they could have requested that further attempts be made or that the judge issue a written summons, or they could have summoned the witnesses themselves. Moreover, even at the appeal stage, they had not asked that witness statements be taken by the District Court, as they could have done by virtue of section 203 of the Criminal Procedures Act.

104. As to whether the evidence in question was the sole or decisive basis for the applicants' conviction, or whether it could have led to their acquittal, the Government reiterated that there was no indication in the court judgments that the applicants' convictions were in any part based on the statements of Al Thani and Sultan; on the contrary, the applicants complained that the courts had not relied on those statements. In the Government's view, the two witnesses were not key witnesses as to the offences of which the applicants had been convicted. As to breach of trust, the conduct of which the applicants had been found guilty related to failure to follow proper procedures within the bank concerning specific loans and it was highly unlikely that either of the witnesses could have given any evidence in that respect; indeed, they had not indicated in their statements that they had any knowledge of how the loans had been handled inside the bank. As to market manipulation, the Government disagreed with the

applicants' understanding of Sultan's statement concerning Ólafur Ólafsson's role but regardless of how that statement was to be interpreted or of how the witnesses would have testified in that connection, they considered that the outcome would not have changed. Moreover, the applicants had not referred to any other specific statements made by either witness that could have led to their exoneration.

105. As to whether there were sufficient counter-balancing factors, the Government pointed out that the applicants had had an opportunity to give their own version and to cast doubt on or support the statements of the two witnesses. Furthermore, the Supreme Court had explicitly stated that the prosecution would have to bear the burden of the witnesses not appearing, which the Government interpreted as a clear indication that the Supreme Court was of the opinion that the statements would not be used against the applicants. The Government considered that the Supreme Court had indeed reviewed the statements and concluded that nothing in them could affect the outcome of the case. Finally, in the Government's view there was a multitude of other incriminating evidence. When the proceedings were viewed as a whole, the evidence in question had had no bearing on the outcome.

106. As to the applicants' complaint that they had not been able to participate in the interviews with the two witnesses, the Government pointed out that it was not normal practice to invite the defence to attend such pre-trial questioning, and considered that there had been no reason to do so in the present case, since it had been the intention to have the witnesses give evidence at the trial.

2. The Court's assessment

(a) The general principles

107. The Court observes at the outset that the applicants do not complain about the absence of any possibility to question witnesses whose previous statements were used in evidence in their conviction but rather about the absence of any opportunity to question witnesses whose evidence they consider would have supported their defence, due to the failure of the authorities to make sufficient efforts to ensure the presence of those witnesses or to make alternative arrangements for their questioning by the defence. The Court notes in this respect that the prosecution did initially wish to call the witnesses to give evidence before the court but that ultimately the witnesses did not appear. However, the statements which they had given during their earlier interviews were not used in the applicants' conviction; on the contrary, the applicants claim that those statements should have been used in evidence, as they were favourable to the defence. In that light, the Court considers that the complaint relates to the right "to obtain the attendance and examination of witnesses on [the accused's]

behalf", set out in the second part of sub-paragraph (d) of Article 6 § 3, rather than to the right "to examine or have examined witnesses against [the accused]". Consequently, the principles set out in the judgments of *Schatschaschwili*, *Al-Khawaja and Tahery*, both cited above, and more recently *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016), are not directly relevant in this case. The Court will therefore rely rather on the principles set out in the recent Grand Chamber judgment of *Murtazaliyeva* (cited above, §§ 150-168), which clarified the case-law established in *Perna v. Italy* ([GC], no. 48898/99, ECHR 2003-V). In *Murtazaliyeva*, the Grand Chamber formulated the following three-pronged test:

- whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation;
- whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial;
- whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings.

(b) Application of those principles to the present case

108. The Court will examine the present case in the light of the three elements specified above, while bearing in mind the practical obstacles faced by the Icelandic courts in securing the attendance of the witnesses in question.

(i) Whether the request to examine the witnesses was sufficiently reasoned and relevant to the subject matter of the accusation

109. The Court observes that the prosecution had made some efforts to secure the attendance of the two witnesses but did not pursue these efforts once it had been informed that they did not wish to participate, considering that since they were foreign diplomats living abroad there were no means of obliging them to attend. The Court notes that the applicants maintain that they raised the issue of the absent witnesses on several occasions, whereas according to the Government the records do not indicate that the matter was raised at the hearing on 7 March 2013 and that it was only at the main hearing in November 2013 that reference was made to this, although even then no formal request was made. The Court further notes the Government's argument that the defence never requested the court or the prosecution to summon the witnesses and that it could in any event have summoned them itself. Finally, it notes the Government's position that the applicants could have requested at the appeal stage that evidence be taken by the District Court for use in the appeal proceedings.

110. Although it appears from the case file that the defence raised the issue of the absence of the witnesses in exchanges with the prosecution, the Court is satisfied that no formal request for the witnesses to be summoned was made in the proceedings before the District Court after the prosecution had informed the court on 7 March 2013 that the witnesses had declined to appear. In any event, it finds that it not decisive whether the applicants raised the issue before the District Court and whether that court failed, as claimed, to give an answer, as three of the applicants (Magnús Guðmundsson did not specifically raise this issue in his appeal) did raise the issue of the witnesses in their appeals to the Supreme Court, which gave reasons for dismissing their claims (cf. *Murtazaliyeva*, cited above, §§ 172-74).

111. In his appeal to the Supreme Court, Hreiðar Már Sigurðsson referred to the insufficient efforts to summon Al Thani and Sultan, whom he decribed as having played a "key role" in the transactions at issue; he stressed the importance of having these witnesses heard "in order to obtain a clearer view of the events leading up to the transaction", adding that Al Thani would have been able to say whether "he had been a participant in a play of deception and artifice ... or whether this had been a case of a normal transaction." Sigurður Einarsson in his appeal referred to Al Thani and Sultan as "key witnesses" whom the prosecution had made insufficient attempts to summon, and submitted that the testimony of the "main spokesman for the buyers of the shares and his assistant" was missing. Ólafur Ólafsson's appeal also raised the matter of those witnesses not having been summoned despite repeated requests. Referring to them as "key players", he maintained that their testimony could have "thrown a much clearer light on the events ... supplied information on the purposes of the transaction from their point of view"; Al Thani, as the owner of Q, had attended meetings where the transactions were discussed and had entered into agreements with Kaupþing and could therefore testify as to the precise role of each individual concerned, while Sultan had also "played an important role" in the transactions, having represented Al Thani and taken care of the details. In particular, Al Thani could have "cleared up many things that were important for the evaluation of proof in the case", such as whether it had been the intention that the appellant would share in the profits, whether Al Thani considered the price of the transaction to be fair and what his intentions and those of the appellant and Sultan had been in establishing an investment fund.

112. On the basis of the foregoing, the Court does not consider that the applicants submitted a sufficiently reasoned request for examination of the witnesses in question. In particular, they did not, in the proceedings before the domestic courts, elaborate on the purpose of such an examination. In their submissions to the Supreme Court, the applicants merely maintained in a rather general manner that the witnesses could shed light on the

background to the transactions and clarify their purpose, and in particular that it had not been the intention that Ólafur Ólafsson should profit from them. While it is indisputable that Al Thani and Sultan played a key role in the transactions, the evidence which it was proposed they would provide was not in the Court's view such as to put in question the charges against the applicants. The fact that Al Thani might have maintained that his intentions were *bona fide* was of no direct relevance to the way in which the loans had been set up within the bank, something of which neither he nor Sultan could be expected to have any knowledge. In these circumstances, the Court concludes that the request for the witnesses to be examined remained vague and unsubstantiated.

(ii) Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial?

113. The Court notes at the outset that under Icelandic law it was open to the defence to call the witnesses directly but that no attempt was made by the defence to secure their attendance, although they were regarded as key witnesses for the defence. However, the Court recognises that a summons issued by the court itself could have had greater authority than a summons by the defence, especially given that the witnesses in question were foreign nationals living abroad (and furthermore enjoying diplomatic status), and that primary responsibility for securing the attendance of witnesses lay with the prosecution. It therefore considers it appropriate to examine whether the Supreme Court responded adequately to the defence's request that those witnesses be heard.

114. The Court notes that the Supreme Court considered that the District Court judgment could only be quashed if it could be established that the evidence of the two witnesses, or the absence thereof, might have had a significant impact on the outcome of the case. It also emphasised that the prosecution would have to bear the adverse consequences of the lack of that evidence. Given the limited and vague scope of the applicants' request, the Court is satisfied that this was an adequate response to that request. Moreover, the Court bears in mind that the witnesses were not within Icelandic jurisdiction and could not be compelled to attend, and that they had made it clear that they did not wish to participate in the proceedings, despite having been informed informally by the Special Prosecutor that the prosecution and the court itself wished to hear them and that they could give evidence by telephone. In these circumstances, it appears unlikely that further efforts to secure their participation would have met with any success.

(iii) Whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings?

115. The Court notes firstly that a considerable volume of evidence was taken into account in the applicants' conviction: forty witnesses were heard by the District Court, which also relied on large amounts of data, including many e-mail exchanges, and the results of phone tappings. The Supreme Court also conducted a thorough review of the evidence in the case. Moreover, the evidence which the absent witnesses could have provided did not go to the core of the charges against the applicants: even if they could have testified that for them it was a *bona fide* transaction, their subjective perception of the purpose of the transactions was not directly relevant to the establishment of how the loans themselves were processed or whether the wrong impression was given regarding demand for shares in the bank.

116. Finally, in so far as the applicants complain that the statements given by the two witnesses were not relied on by the courts, the Court refers to *De Tommaso v. Italy* [GC], no. 43395/09, § 170, 23 February 2017:

> "While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. In principle, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see, for example, *Dulaurans v. France*, no. 34553/97, §§ 33-34 and 38, 21 March 2000; *Khamidov v. Russia*, no. 72118/01, § 170, 15 November 2007; *Anđelković v. Serbia*, no. 1401/08, § 24, 9 April 2013; and *Bochan v. Ukraine* (no. 2) [GC], no. 22251/08, §§ 64-65, ECHR 2015)."

In the present case, the Court sees nothing arbitrary or manifestly unreasonable in the decision not to rely on those statements as evidence in the case, firstly as they had been obtained in informal interviews and secondly as there was no opportunity to have the evidence tested in court. Furthermore, the Supreme Court made it clear that the prosecution would have to bear the consequences of the absence of that evidence.

117. In the light of the foregoing, the Court concludes that there has been no violation of Article 6 §§ 1 and 3(d) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

118. The applicants complained that the prosecution had tapped and listened to telephone conversations between them and their respective lawyers, in violation of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

119. The Government contested that argument.

1. The arguments of the parties

120. The Government submitted that the applicants had not exhausted domestic remedies with regard to their complaint under Article 8 of the Convention. In the first place, they had not raised that complaint in substance before the domestic courts; while the applicant Hreiðar Már Sigurðsson had made a passing reference to Article 8 in his appeal to the Supreme Court, the applicants had in their written pleadings relied principally on Article 6 of the Convention. The Supreme Court's judgment did not indicate that it had addressed directly the question whether the phone tapping had infringed Article 8 and the summary of the applicants' oral pleadings did not mention that this had been argued at the main hearing. Furthermore, the applicants had not brought any other proceedings, such as a civil action against the State seeking damages for the violation of their rights under Article 8. In their submissions in reply to the applicants' observations, the Government indicated that the applicant Hreiðar Már Sigurðsson had lodged a civil action against the State in the District Court on 15 November 2016. They subsequently informed the Court that in a judgment of 30 April 2018 the District Court had awarded him ISK 300,000 in respect of telephone tapping which had taken place after the applicant had been told that he was a suspect but had rejected his claim as regards conversations with his lawyer on the ground that they had not been listened to beyond for the purpose of identifying who was speaking.

121. The applicants maintained that domestic remedies had been exhausted as the question of the recording of privileged conversations had been brought before both the District Court and the Supreme Court, and the latter had seen no problem in the way in which the tapping had been handled. The applicants did not comment specifically on the question of a civil action.

2. The Court's assessment

122. The Court observes firstly that although all four of the applicants complained in this respect, only Hreiðar Már Sigurðsson and Magnús Guðmundsson mentioned specific incidents which had been acknowledged by the Special Prosecutor; the other two applicants did not refer to any concrete incidents and did not raise this issue in their appeals to the Supreme Court. In view of the Special Prosecutor's explanation that the incidents in respect of Hreiðar Már Sigurðsson and Magnús Guðmundsson

had been errors and in the absence of any evidence to suggest otherwise, the Court finds that the complaints by Sigurður Einarsson and Ólafur Ólafsson in this respect are unsubstantiated and must be declared inadmissible as manifestly ill-founded pursuant to Article 35 §§ 3(a) and 4 of the Convention.

123. The Court notes that Magnús Guðmundsson made no mention of Article 8 of the Convention or of his right to respect for private life or correspondence in his appeal to the Supreme Court, but specifically referred to the Criminal Procedures Act and Article 6 § 3(c) of the Convention. Consequently, it cannot be held that he raised a complaint under Article 8 in substance. Conversely, Hreiðar Már Sigurðsson made specific reference to Article 8 in his appeal to the Supreme Court, maintaining that his right to privacy had been violated, and to that extent it may be accepted that he raised his complaint under that provision explicitly, albeit without further elaboration. However, the Court observes that while the Supreme Court could undoubtedly have declared the telephone tapping in question to be unlawful and/or unjustified, it is less clear whether it was open to the Supreme Court, in the context of criminal proceedings, to deal with the substance of the Convention complaint that the interference with the applicant's right to respect for his private life was not "in accordance with the law" or not "necessary in a democratic society" and to grant appropriate relief in that respect (see *Akhlyustin v. Russia*, no. 21200/05, § 24, 7 November 2017, and *Zubkov and Others v. Russia*, nos. 29431/05, 7070/06 and 5402/07, § 88, 7 November 2017, and *Konstantin Moskalev v. Russia*, no. 59589/10, § 22, 7 November 2017; see also, in connection with the existence of an effective remedy under Article 13 of the Convention, *Khan v. the United Kingdom*, no. 35394/97, § 44, ECHR 2000-V, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 86, ECHR 2001-IX, *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, § 59, 8 March 2011 (where the question of exhaustion was joined to the merits of the Article 13 complaint), and *İrfan Güzel v. Turkey*, no. 35285/08, §§ 106-107, 7 February 2017; and, by contrast, *Dragojević v. Croatia*, no. 68955/11, §§ 35, 42, 47 and 72, 15 January 2015; *Šantare and Labazņikovs v. Latvia*, no. 34148/07, §§ 25 and 40-46, 31 March 2016; and *Radzhab Magomedov v. Russia*, no. 20933/08, §§ 20 and 77-79, 20 December 2016). Indeed, the Supreme Court did not address the issue of private life in its judgment, referring rather to the fact that the recordings had not been used in evidence and the absence of any argument to the effect that they might have affected the investigation. While the Government do not explicitly maintain that this remedy was ineffective (nonetheless qualifying the notion of an examination of the Article 8 complaint by the Supreme Court as "unconventional"), the Court finds in the light of its aforementioned case-law that an appeal to the Supreme Court in the context of criminal proceedings did not constitute an effective remedy in respect of

a complaint of a violation of the right to private life under Article 8 of the Convention.

124. The question remains whether the applicants should, as suggested by the Government, have made use of a civil action for damages against the State. The Court has no reason to doubt that in the context of civil proceedings the domestic courts would be able to examine the lawfulness and necessity of the measure in question and, if appropriate, award compensation. The applicants have not contested the Government's submission in that respect. As to the applicant Magnús Guðmundsson, the Court notes that he has not brought a civil action against the State; as to the applicant Hreiðar Már Sigurðsson, it notes that he lodged a civil action in November 2016 and that the District Court gave judgment on 30 April 2018, *inter alia* rejecting his claim as regards conversations with his lawyer. The Court has not been informed whether the applicant has lodged an appeal against that judgment. In these circumstances, the applicants' complaints under Article 8 of the Convention must be rejected for non-exhaustion of domestic remedies in accordance with Article 35 §§ 1 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

125. 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

126. Each applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage. The applicants did not claim an award for pecuniary damage.

127. The Government submitted that the finding of a violation would in itself constitute just satisfaction for any non-pecuniary damage. They also maintained that the claim for non-pecuniary damage was excessively high.

128. Taking account of the particular circumstances of the present case, the Court agrees with the Government that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage. The Court further notes that it is for the respondent State to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation or violations found by the Court and to redress as far as possible the effects. In this regard, the Court observes that Articles 228 and 232 of

the Criminal Procedures Act provide that the Committee on Reopening of Judicial Proceedings can, when certain conditions are fulfilled, order the reopening of criminal proceedings that have been terminated by a final judgment rendered in the Court of Appeal or the Supreme Court (see, *mutatis mutandis*, *Ibrahim and Others*, cited above, § 315, and *Ramos Nunes de Carvalho e SÁ*, cited above, § 222). In this regard, the Court emphasises the importance of ensuring that domestic procedures are in place whereby a case may be re-examined in the light of a finding that Article 6 of the Convention has been violated. As the Court has previously stressed, such procedures may be regarded as an important aspect of the execution of its judgments and their availability demonstrates a Contracting State's commitment to the Convention and to the Court's case-law (*Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 99, 11 July 2017).

B. Costs and expenses

129. The applicants submitted the following claims in respect of the costs and expenses incurred before the domestic courts and before the Court:

Hreiðar Már Sigurðsson: ISK 58,526,931 for the domestic proceedings and EUR 13,500 plus ISK 2,600,000 for the proceedings before the Court;

Sigurður Einarsson: ISK 28,758,883 for the domestic proceedings and EUR 13,500 plus ISK 2,600,000 for the proceedings before the Court;

Ólafur Ólafsson: ISK 33,492,706 for the domestic proceedings and EUR 13,500 plus ISK 3,375,000 for the proceedings before the Court;

Magnús Guðmunsson: ISK 40,729,681 for the domestic proceedings and EUR 13,500 plus ISK 1,338,624 for the proceedings before the Court.

The applicants submitted invoices totalling EUR 54,000 in respect of the proceedings before the Court.

130. The Government submitted that not all the costs incurred could be attributed to preventing the alleged violations or obtaining redress, since the applicants' defence had also been based on other grounds. However, the Government were unable, in the absence of a clear breakdown of the costs, to define which costs related to the alleged violations. They further observed that any violations in connection with the Supreme Court proceedings would not entail reimbursement of the costs incurred in the District Court proceedings. Finally, they noted that there was no evidence of the costs expressed in Icelandic krónur for the proceedings before the Court.

131. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, and in particular taking into account that a violation has been found in respect of only one of the complaints submitted

by the applicants, relating to an issue of impartiality of the Supreme Court which only came to light after the domestic proceedings had ended, the Court dismisses the claim in respect of the costs of the domestic proceedings. On the other hand, it considers it reasonable to award each of the applicants the sum of EUR 2,000 in respect of the costs of the proceedings before the Court, taking into account that the observations submitted by the applicants' representative were common to all four applicants.

C. Default interest

132. The Court considers it appropriate that the default interest rate 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. *Declares*, unanimously, the complaints concerning the alleged lack of impartiality of Á.K. on account of the positions held by his son, the alleged denial of access to data and the alleged failure to summon witnesses admissible, and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention on account of Á.K.'s lack of impartiality;

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

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

5. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

6. *Holds*, unanimously,
   (a) that the respondent State is to pay to each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be converted into the

currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 4 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Paul Lemmens
Registrar	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.

S.H.N.
P.L.

PARTLY DISSENTING OPINION OF JUDGE PAVLI

1. I have voted with the majority in all respects but one. I regret that I cannot agree with their finding that there has been no violation of Article 6 in respect of the alleged denial of access to investigative data. My disagreement concerns both the general approach followed by the majority under this heading and its specific findings on the merits.

A. The relevant test under Article 6 § 3(b)

2. The relevant principles regarding the rights of the accused, under Article 6 §§ 1 and 3(b) of the Convention, to obtain access to the investigative materials of the case against them, including any exculpatory evidence contained therein, were summarised in the *Van Wesenbeeck v. Belgium* (nos. 67496/10 and 52936/12, 23 May 2017) and *Natunen v. Finland* (no. 21022/04, 31 March 2009) cases, as described in paragraphs 85 and 86 of the current judgment. The defence rights of access to and disclosure of prosecution evidence are not absolute; however, any restrictions must be "strictly necessary" in view of the central role of equality of arms in the Article 6 architecture governing criminal due process (see *Van Wesenbeeck*, § 68).

3. The majority opinion concedes that denying the applicants access with respect to at least one of the evidentiary data sets (the "tagged" documents) "raises an issue under Article 6 § 3(b)" (see paragraph 91). However, at no time is a proper review carried out as to whether the restrictions meet the test of strict necessity. Instead, the relevant part of the judgment moves to the conclusion that, in view of certain supposed procedural failures by the defence and the availability of judicial review at national level, the applicants were not "denied a fair trial overall."

4. I find the majority's approach on this issue, which presents significant novelties for our Article 6 jurisprudence, problematic for a number of reasons. First, it fails to grant sufficient weight, in my view, to the serious disclosure issues raised by the applicants in the context of a highly complex criminal trial. By choosing to bypass the Van Wesenbeeck test in favour of a global finding that the overall fairness of the trial was not affected, the judgment does a disservice to the clarity and consistency of our case law, and misses an opportunity to weigh in on the complicated questions at the intersection of new technologies and high-volume evidentiary issues. On the merits, I find the reasons relied on by the majority to dismiss the applicants' claims as partly inadmissible and partly insufficient.

B. Whether the access rights of the defence were restricted

5. The current case involves an unusually complex financial crimes prosecution, with multiple defendants and a very high volume of electronic material seized or otherwise obtained by the prosecution. This included at least four data sets of decreasing size: the "full collection of data" resulting from the investigation; the "tagged" data set of potentially relevant evidence, which the prosecution selected from the full data using advanced search technologies; the "investigation documents" resulting from further filtering of the tagged data set; and the actual evidence submitted in court, which included a subset of the investigation documents.

6. To recap, the applicants claim that they were denied adequate access to the first and second data sets. In particular, they were not allowed to conduct their own searches of the first data set, using the same software that had been extensively used by the prosecution. In addition, the prosecution - and the courts on at least three occasions - refused to grant them access to the list of documents "tagged" (as relevant or potentially relevant evidence) as a result of the prosecution's searches, to summary lists of seized data, and to other investigative materials. The prosecution also denied the defence teams' specific requests for access to "collections of emails and tapped telephone calls of individuals other than the applicants which had not been put in the investigation file" (see paragraph 75 of the judgment). This had given the prosecution a *de facto* monopoly on the use of advanced digital search facilities, without proper judicial review in the early stages of the process.

7. The majority's choice to steer straight into a global fairness review means that there are no clear conclusions as to whether the access rights of the defence were restricted and, if so, to what extent. But some indirect conclusions can be drawn.

8. The judgment draws a distinction between the first and second data sets. With respect to the former, it finds in effect that electronic searches by the defence would amount to a "fishing expedition" in the absence of any specification as to "what could have been clarified by further searches" (see paragraph 90). In this context, involving millions of documents, this argument seems akin to a requirement to specify the precise location of a needle within a haystack. It also tends to turn on its head the prosecutorial duty to disclose any exculpatory evidence (more on this point below). The defence searches would have been no more of a fishing expedition than that carried out by the prosecution.

9. With the respect to the "tagged" data, the majority concedes that, under our case-law, the prosecution cannot exclude the defence from the process of assessing the importance of non-disclosed information; and that further searches of the tagged data set would have been technically "rather straightforward" (see paragraph 91). It is satisfied, however, with the

Government's argument that there was no prosecutorial duty under national law to create documents (specifically, lists of seized data) that did not already exist. There is no discussion of the implications of this national legislative choice for the purposes of Article 6 of the Convention.

10. It is worth recalling at this point that what is at stake in this case is a fundamental tenet of criminal due process, namely equality of arms. In the light of this cardinal principle, the majority's overall approach seems insufficiently attuned to the complexities of electronic disclosure in criminal (or for that matter, civil) proceedings involving high-volume data; to the use of modern technological tools in this context; and to their combined implications for equality of arms. The assumption that standard rules of disclosure ought to apply unchanged in this context is one that, at the very least, needs to be tested.

11. A basic review of comparative law in jurisdictions with relevant experience in this field – a more extensive version of which would have been helpful in the novel context of this case – suggests that the prosecution is required to provide the defence with the fullest possible access to electronic investigative materials, including the ability to conduct their own searches, in terms and with capacities comparable to those of the prosecution. This is considered the minimum or baseline safeguard required in complex cases by the principle of equality of arms.[1]

12. Furthermore, in order to meet its duty of disclosing any exculpatory material in its possession, as both our case-law and Icelandic law require, the prosecution may also be required to show its good faith through additional proactive steps, for example by indexing the documents, providing files in a searchable format, and specifying any known exculpatory evidence. A finding, on the other hand, that the prosecution has engaged in a malicious "data dump," in order to make it harder for the defence to analyse the data may lead to a conclusion of suppression of evidence.[2]

13. The above approach recognises that, even where the defence benefits from substantial access, the prosecution still holds distinct advantages: it will normally have had a longer period of time to analyse the evidence, generally greater analytical resources, and more intimate knowledge of the material, including in relation to any exculpatory elements. In view of these considerations, the current majority's conclusion that the prosecution "did

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[1] See, for example, the leading U.S. case of *United States v. Skilling*, 554 F.3d 529 (5th Circuit 2009) (involving several hundred million electronic records).

[2] *Ibid*. See also U.S. Department of Justice's electronic discovery protocol (2012), which recommends that, to meet the challenges of the digital age, prosecutors should provide to the defence a searchable file, as well as a table of contents with a high-level description of the "general categories of information" available within the material. See *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases*, at Strategies, 5(b), available at: https://www.justice.gov/archives/dag/page/file/913236/download.

not hold any advantage over the defence" in the circumstances of the current case (see paragraph 90) seems rather far-fetched.

14. Secondly, it is a logical consequence of the preceding argument that full electronic disclosure in high-volume criminal investigations must be provided by default, that is, as a matter of standard prosecutorial practice and without the need for the defence to initiate and litigate a litany of procedural requests. Judicial oversight should, in principle, be exercised at this preliminary stage, when the terms of disclosure and searchability of data ought to be agreed and approved, whenever possible, by a judicial officer.

15. Emerging practice in the Council of Europe area is in line with this general approach. Thus, courts in at least two jurisdictions (the United Kingdom and Ireland) have approved in recent years the use of technology-assisted review, employing a form of artificial intelligence known as predictive coding, for the purposes of electronic disclosure in high-stakes civil litigation.3 The rationale would apply with equal force in criminal cases of comparable complexity.4 Again, the underlying premise for the use of such advanced technology is, of course, that both sides are granted the fullest possible access to begin with. And, secondly, that criminal-law frameworks and investigative practices are organised in such a way as to facilitate adequate access for the defence at the appropriate (that is, early) stage of proceedings.

16. On the facts of the current case, I would conclude that the applicants' access rights were significantly restricted by virtue of the national authorities' refusal to grant their defence teams meaningful and equitable access to the data sets at issue, and in particular the tagged data.

17. In addition, as a structural matter – and even allowing some margin for the specificities of each national system – the relevant Icelandic laws and prosecutorial practices do not appear to be organised in a way capable of ensuring adequate compliance with the disclosure rights of defendants in high-volume criminal cases. This is obvious from the Government's explanations, whether of a legal or technical nature, as to why access to most of the additional data requested by the defence teams was not possible or warranted (see below for specifics). Equally, it is fair to say that the

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[3] See *Pyrrho Investments Ltd v. MWB Property Ltd* [2016] EWHC 256 (UK High Court); and *Irish Bank Resolution Corporation Ltd & ors v. Quinn & ors* [2015] IEHC 175 (High Court of Ireland).

[4] The predictive coding technology, already in wide use in some jurisdictions, allows parties to save a significant amount of time and resources in analysing large data sets. See, among other sources in the criminal context: Elle Byram, *The Collision of the Courts and Predictive Coding: Defining Best Practices and Guidelines in Predictive Coding for Electronic Discovery*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 675 (2013); and Brandon L. Garrett, *Big Data and Due Process*, 99 CORNELL L. REV. ONLINE 207 (2014).

complex nature of the criminal investigation in the current case ought to have been apparent to the national authorities virtually from the outset.

18. This structural flaw would be a sufficient basis, in my view, for finding a violation of the overall fairness of proceedings under Article 6 § 1 of the Convention.

C. C.Whether the restrictions on access were justified

19. For the sake of argument, let me nevertheless address the specific justifications offered for the restrictions on the applicants' access rights and whether they were "strictly necessary" under our case law.

20. While the Government puts forward a long list of arguments as to why the restrictions were justified, the majority appears to single out two main lines of justification, in paragraph 92. First, it places great emphasis on the fact that the applicants did not seek a formal court order "for access to the 'full collection of data' or for further [database] searches to be carried out" (see paragraph 92). This line of reasoning is objectionable on at least three grounds. To begin with, the Government's argument under this heading is in the nature of a non-exhaustion claim; not having raised such an argument at the admissibility stage, the Government is normally estopped from relying on it on the merits. In second place, it does not appear to be entirely correct factually: the applicants did file, for example, requests for lists of documents that would be found by using a certain keyword, which were rejected by the domestic courts on unspecified grounds (see paragraph 83). But finally and most importantly, this line of reasoning is inconsistent with the duty of the prosecution to provide extensive disclosure by default in cases involving large volumes of electronic investigative data, as the only way to begin to ensure genuine equality of arms.

21. The same would apply to the second justification put forward by the majority, namely that the defence failed to specify what kind of additional evidence they were seeking, relying for example on "overviews of the seized items and their rough content" (see paragraph 92 in fine). With respect, this argument severely underestimates, in my view, the complexities of analysing large and interconnected amounts of investigative data, whether one is equipped with "merely" human intelligence or aided by artificial intelligence.

22. When one parses through the multiple lines of justification offered by the Government under this heading, it seems clear that concerns about a supposedly excessive effort played a significant role: the high volume of material that would have to be produced to meet the defence requests (see paragraph 79) or the need to re-import data into a certain software (see paragraph 83). One would hope that this is not what is meant by "strictly necessary" restrictions: it would be a sad day for Article 6 if mere convenience were to trump fundamental fair-trial rights.

23. This is not to say that extensive electronic disclosure of the kind envisaged in this opinion does not raise other thorny issues, including matters related to the protection of the basic rights and interests of third parties. The majority notes these concerns, but finds that they did not present "insurmountable obstacles", a conclusion that I share on the grounds, inter alia, that the Government failed to show that it had properly and genuinely considered ways to reconcile disclosure to the defence with minimisation of the potential risks to third-party rights.5 In any event, one would hope that these will be the kinds of issues that will preoccupy our future case-law in this area.

24. As a general matter, the reluctance to engage directly with the applicants' claims under Article 6 § 3 of the Convention, with its various fundamental guarantees of criminal due process, has consequences – and not only of a theoretical nature. In the first place, it tends to water down the protections guaranteed by the five sub-headings of that provision, as if they were not capable of being violated on their own terms. Secondly, it constitutes a missed opportunity to provide clear and coherent guidance to national courts and other authorities on how these intricate Convention guarantees are to be interpreted and applied at the national level. This, in my view, is one of the central functions of this Court, which tends to be undermined if all competing considerations are reflexively force-fed into a less-than-transparent meat grinder labelled "the overall fairness of proceedings."

25. To be clear, an ultimate ruling on overall fairness under Article 6 § 1 in no way precludes or replaces the need to carry out a proper review of claims made under the various limbs of Article 6 § 3. A cursory look at recent Grand Chamber judgments would confirm this: e.g. in *Ibrahim and Others v. the United Kingdom* ([GC], nos. 50541/08 and 3 others, 13 September 2016), a case involving denial of access to counsel and related rights, the Court proceeded, in a clear and systematic fashion, to review, first, whether the applicants' rights under Article 6 § 3(c) had been restricted, and, secondly, whether the restrictions were justified under the relevant tests. Having addressed those two questions, the Grand Chamber went on to consider the impact of the restrictions on the overall fairness of proceedings for each of the four applicants.

26. The majority relies on *Murtazaliyeva v. Russia* ([GC], no. 36658/05, 18 December 2018) in opting to review the applicants' claims from the point of view of Article 6 §§ 1 and 3(d) "taken together" (see paragraph 87). However, even in *Murtazaliyeva*, a case involving a failure to hear witnesses proposed by the defence, the Grand Chamber identified an (updated) three-step test, with the impact on the overall fairness of

[5] For an example of a considered approach to these questions, see item 10 (Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure) of the U.S. Department of Justice's electronic discovery protocol, note 2 above.

proceedings constituting only the final prong. The majority follows this same approach in assessing the current applicants' claims under Article 6 § 3(d) (starting at paragraph 94), in contrast to the method chosen under paragraph 3(b) of the same article.

27. To put it another way, "taken together" is not the same as mashed together. A rigorous analysis of the complaints made under the various limbs of Article 6 § 3 has the added, and not insignificant, benefit of attenuating the inherently subjective nature of the global fairness review, thus enhancing the legitimacy of the final outcome.

28. Finally, had the majority chosen to engage more meaningfully with the challenges of complex criminal investigations in our high-tech age, it could have provided an incentive to the Icelandic authorities, and perhaps others, to do the same. That will have to wait for another day.