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The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex

Request according to Article 43 of the European Convention on Human Rights for referral of a judgment to the Grand Chamber

Procedure

1. This is a joint request, on behalf of Mr. Gestur Jónsson and Mr. Ragnar Halldór Hall, for referral of the Second Section's judgment of 30 October 2018 in the case of *Gestur Jónsson and Ragnar Halldór Hall v. Iceland* (applications nos. 68273/14 and 68271/14) to the Grand Chamber.

2. The request is made under Article 43, paragraphs 1 and 2, of the European Convention on Human Rights ("*ECHR*"). The applicants argue that the judgement of the Second Section raises both serious questions affecting the interpretation and application of the Convention and serious issues of general importance for the future protection of rights under Article 6-7 ECHR.

Facts

3. The applicants refer to the description of facts in the Second Section judgement, at paragraphs 5 – 30. Further, the applicants refer to their complaints to the Court, at paragraphs 35, 38-48, 75, 79-80, 83-84 in the Second Section judgement.
4. The following facts are undisputed between the applicants and the government according to the Second Section judgement:
   a) That a motion to fine the applicants as defence counsel for contempt of court was made by the prosecution, in a Reykjavik District Court hearing, in a criminal case against the applicant's ex-clients on 11 April 2013 (paragraph 14 of the Second Section judgement);

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b) That presiding judge Guðgeirsson did not fine the applicants in the hearing of 11 April 2013 (paragraph 14);

c) That another judge at the same court, judge Sigvaldason, was assigned to the criminal case against the applicants' ex-clients, after the first judge went on sick leave (paragraph 15);

d) That no trial took place in the first instance to hear any charges against the applicants before a judgement levying a fine against them was handed down (paragraphs 15-16);

e) That the applicants were fined in a judgement in a criminal case that they were not parties to and in a court hearing in that case that they were not summoned to (paragraphs 15-16);

f) That the applicants were accordingly never afforded the status of *suspects* at an investigative stage or the status of *accused persons* in the first instance proceedings and that a criminal case against them was therefore initiated against the applicants by a *conviction judgement* of the Reykjavik District Court (paragraphs 16, 18);

5. The following facts are undisputed between the applicants and the government on the appeal proceedings before the Supreme Court:

a) That the applicants were never offered the opportunity to give their own statements before the Supreme Court (paragraph 22);

b) That the applicants were never offered the opportunity to lead witnesses before the Supreme Court (paragraph 22);

c) That the applicants never waived the rights to request testimonies (paragraph 48);

d) That a case-party has never in Icelandic legal history been granted leave to have testimonies heard before the Icelandic Supreme Court and that the court has only once heard such testimonies directly once, at its own request (paragraph 71);

e) That the fine amount levied against each of the applicants for contempt of court, 1.000.000 ISK, was ten times higher than the highest amount in Icelandic legal history at the time (paragraphs 75, 80).

6. Other than the above, reference is made to description of case facts in the applications submitted to the Second Section in the first round, as well as in its judgment of 30 October 2018.

The Relevant Domestic Law and Practice

7. Reference is made to description of Icelandic law in the judgement of the Second Section, at paragraphs 31-33.

Findings of the Second Section of non-violation of Article 6 of the ECHR

Introduction

8. The Second Section concluded that despite wholescale violations of the applicants' rights under Article 6 ECHR by the Reykjavik District Court, there had been no violation of the Article, as the applicants had been given sufficient opportunity to obtain a "*fresh*" factual and legal determination of the merits of the charges against them before the Icelandic Supreme Court (paragraph 69).
9. The Second Section found that it was not in a "*position*" to re-assess "*unequivocal statements*" on Icelandic Law in the Supreme Court judgement on the possibility to lead witnesses and give statements before the Supreme Court. For that reason it found that the Supreme Court's interpretation and application of Icelandic Law, on the possibility to conduct witness testimonies before the court, could not be considered "*arbitrary or manifestly unreasonable*" and that the applicants had been granted a full trial on both facts and law (paragraphs 71-72).
10. The Second Section also found that Article 6 did not require the Supreme Court to act *of its own motion* to ask the applicants whether they wished to give statements before the court or have witnesses examined (paragraphs 69, 71).
11. Further, the Second Section found that the Icelandic Supreme Court had cured the breach of Article 6 that had occurred in the first instance, despite upholding the first instance conviction, as the violations of rights in the first instance did not involve the very "*composition*" of the court of first instance, but violations that had occurred in proceedings before a first instance court (paragraph 73).
12. The Second Section thus concluded that the proceedings against the applicants on the whole to be fair under Article 6, but did not assess each element of the complaints under the Article (paragraph 60).
13. In particular the Second Section referred to the Grand Chamber's judgement in *Sejdovic v Italy* to support its findings on *in absentia* judgements (paragraph 62).

14. Below, the applicants submit that the judgement gives rise to issues of consistency with the Court's case-law and that it is a matter of considerable general importance that it is either clarified or overturned by the Grand Chamber under Article 43 of the EHCR.

Each violation of Article 6 should have been considered separately on its merits

15. The complaints of the applicants were based on all of the material guarantees provided for in Articles 6(1), 6(2) and 6(3) (a)-(d) of the ECHR, see paragraphs 19-74 of their complaints.

16. The applicants submit that the Second Section was obligated to consider each alleged violation separately on its merits and not just whether the proceedings were fair as a whole. The applicants refer to e.g. the Grand Chamber's reasoning in the case of *Göç v. Turkey* (no. 36590/97) in this regard, paragraph 46 and onwards:

> *"The Chamber considered that it was unnecessary to rule on the merits of this complaint since it had concluded that the facts of the case disclosed a breach of the applicant's right to an adversarial procedure. The Grand Chamber, for its part, considers that the two complaints raised by the applicant under Article 6 are distinct and thus merit separate consideration. It is true that the complaints, taken separately, each amount to a criticism of the fairness of the domestic proceedings within the meaning of paragraph 1 of that Article. However, given the fundamental nature of the right to a public hearing, of which the right to an oral hearing is one aspect, the Court is of the view that the applicant's complaint under this head cannot be taken to be absorbed by a finding that his right to an adversarial procedure was breached. The complaint should therefore be considered separately on its merits, the more so as it was the applicant's principal complaint under Article 6."*

17. According to the judgement, it is necessary for the Court to consider each element of criticism on the fairness of domestic proceedings under Article 6, if the complaint relates to a deprivation of the right to a) an adversarial court

procedure and b) the right to an oral hearing. In this case, the applicants complained of violations of both rights, like in *Göç v Turkey*.

18. Further, if a deprivation of two separate fundamental rights gives rise to an obligation of the Court to separately inspect each violation, like in *Göç v Turkey*, a total deprivation of rights under Article 6 in the first instance should as well.
19. Further, the applicants submit that there are at least two fundamental breaches of the applicants' rights in the first instance that could not be remedied merely by providing a fresh appeal forum, before the Supreme Court, for assessment of facts and law under Article 6.
20. The first is that the case was *initiated by a conviction judgement* in the first instance and that the applicants were therefore never at any stage of the domestic proceedings *presumed innocent* under Article 6(2) ECHR. This fundamental flaw in the proceedings was not assessed independently by the Second Section, for unexplained reasons.
21. The second is that a fresh forum for the inspection of facts by way of oral testimonies was not provided by the Icelandic State in the appeal court proceedings. The Icelandic Supreme Court has never in Icelandic legal history allowed case-parties to conduct testimonies before the court. Therefore, even if such a right existed under the letter of Icelandic procedural law, which it does not, it would never be "*practical and effective*" as required under the ECHR. However, the Second Section failed to assess whether the government had *effectively* secured those rights under the Convention.

Breaches of the right to presumption of innocence cannot be cured by appeal proceedings.

22. Article 6(2) ECHR embodies the principle of presumption of innocence as a fundamental right of a defendant in criminal proceedings. It applies both to the investigation stage prior to court proceedings and at all stages of the subsequent trial proceedings, in the first instance and in any appeal proceedings.
23. This right requires *inter alia*, that: (1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of proof is on the

prosecution, and (3) any doubt should benefit the accused (see e.g. *Barberà, Messegué and Jabardo v. Spain, no. 10590/83,* paragraph 77).

24. A defendant's right to be presumed innocent and to require the prosecution to bear the onus of proving all allegations against him or her also "*forms part*" of the general notion of a fair hearing under Article 6, paragraph 1, of the ECHR, "*in addition to being specifically mentioned in Article 6 § 2*" (see e.g. *Phillips v. the U.K. (no. 41087/98),* paragraph 40).
25. In Chapter 3.1. of their complaints, the applicants argued that the Icelandic state had breached paragraphs 1-3 of Article 6 ECHR. At paragraphs 19-22 of their complaints, the applicants argued that initiating criminal proceedings with *conviction judgements* in the first instance was incompatible with the right to presumption of innocence under Article 6(2) ECHR. At paragraph 26, the applicants also argued that as the case had been initiated with a conviction judgement, no indictment had been served on them, where they had been informed of the charges against them and given the opportunity to defend themselves, in breach of subsection a) of Article 6(3) ECHR.
26. In the government's reply letter to the Court, dated 25 July 2016, it did not contest that the right to presumption of innocence had been breached by initiating a criminal case with a conviction judgement in the first instance. The government did, however, argue in a general manner that any breaches of Article 6 had been remedied by appeal proceedings. The right to presumption of innocence was never mentioned specifically in this context by the government.
27. In paragraph 11, subsection d), of each of the applicants' reply letters to the government's submissions, dated 7 September 2016, they specifically underlined that the government "*does not object to the Applicant's argument that it was a violation of his right to being presumed innocent under Article 6(2) of the Convention and that a criminal case against him was initiated by a conviction judgement in the first instance. The Applicant thus had to defend himself from a position of presumed guilt before the Supreme Court and was never presumed innocent*".
28. In its reply letter to the Court, dated 21 October 2016, the government provided no further argument in support of it having remedied the breach of the right to presumption of innocence by providing the possibility of appeal proceedings.

29. In light of the above, the government has not at any stage of the proceedings provided any explanation of how the right to presumption of innocence was remedied by the appeal proceedings or explained how it was consistent with Article 6(2) that criminal case defendants were forced to start the only proceedings available to them from a position of *presumed guilt*. Despite this the Second Section did not find that a violation of Article 6(1) and 6(2) ECHR had occurred.

30. Because of the importance attached to the *in absentia* judgement in *Sejdovic v Italy* by the Second Section, the applicants would like to underline that two crucial distinctions must be made between that case and this case, specifically with regards to the right to *presumption of innocence*. First, that no criminal investigation took place in this case where the applicants were afforded *suspect* status (unlike in *Sejdovic*). Second, no trial ever took place in the case of the where they were afforded the status of *accused persons* prior to the *in absentia* judgement being handed down (unlike in *Sejdovic*).

31. While it is therefore in itself correct that the criminal case judgement in *Sejdovic* was handed down *in absentia,* that only occurred after a full criminal investigation by police authorities and a full criminal trial before a national court. *Sejdovic* had been given suspect status by the Italian police and "*initial statements had been taken by the police from witnesses*" that indicated that the applicant was guilty of a criminal offence. In the subsequent criminal trial *Sejdovic* was presumed innocent, given the status of an "*accused person*", appointed a public defendant that called witnesses before the court and argued for the defendant's acquittal in oral pleadings in an adversarial hearing. Therefore, *Sejdovic* was presumed innocent, both at the investigative stage and in the first instance trial proceedings, even if he did not attend the criminal trial in person.

32. However, the proceedings in *Sejdovic* were *not* initiated by a conviction judgement without a preceding investigation or trial, as in this case. Neither was *Sejdovic* forced to start his defense in a criminal case from a position of presumed guilt like the applicants.

33. It is also important to note in this regard that there was nothing to prevent the Reykjavik District Court from giving the applicants the opportunity to exercise

their rights under Article 6. There were no allegations of the applicants being suspected fugitives from the law, like in *Sejdovic* and no need to convict them *in absentia.* The Reykjavik District Court simply *chose* not grant them any rights, for reasons that have not been explained by the government. The Reykjavik District Court did not even specify the applicants as case-parties to the relevant judgement or summoned them to the hearing where the judgement against them was handed down.

34. The applicants further submit that initiating criminal proceedings with a first instance conviction judgement is a violation of Article 6 that *can never be remedied* with appeal proceedings, as criminal case defendants are effectively forced to disprove their guilt before an appellate court, the factual description put forth in the first instance judgement and its legal reasoning. This, by definition, makes the appeal proceedings biased from the outset, and may influence the mindsets or findings of appeal judges.

35. Further, any practicing attorney or judge knows from experience that having to overturn a first instance conviction in a criminal case on appeal, is much more difficult than obtaining an acquittal in the first instance. A convicted criminal case appellant is thus at a clear disadvantage from the outset, when compared to an accused person´s position in the first instance.

36. In this regard the applicants note that the Court has repeatedly held that the requirements of Article 6 are relevant before a case is sent for trial in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with Article 6 (see, *inter alia*, the following judgments cited in paragraph 36 of the judgment in the case of *Imbrioscia v Switzerland (no. 13972/88)*: *Engel and Others v. the Netherlands; Luedicke, Belkacem and Koç v. Germany*; *Campbell and Fell v. the United Kingdom*; *Can v. Austria*; *Lamy v. Belgium*, *Delta v. France*, *Quaranta v. Switzerland*, and *S v. Switzerland).*

37. The applicants submit that this violation to the right to presumption of innocence can only be remedied by quashing the first instance judgement and either acquitting the defendants or ordering a first instance re-trial where defendants are afforded the status of accused persons.

38. In the view of the applicants it is of critical importance, for the future protection of rights under Article 6 ECHR, that Contracting States are not allowed to start criminal cases with conviction judgements, without preceding trials or

investigations. It is also vitally important for the protection of first instance rights that Contracting States are not authorized to remedy such shortcomings merely with providing defendants with a forum to appeal their convictions, as the Court has underlined the particular importance of the right to presumption of innocence at every stage of proceedings, including in the first instance. The Second Section judgement therefore raises both serious questions affecting the interpretation or application of the Convention on the presumption of innocence and the ability of an appeal court to remedy such violations. These are serious issues of general importance on the application of Article 6 ECHR, in all Contracting States, within the meaning of Article 43 ECHR.

39. The applicants would like to specifically underline in this regard that while the interests in their case may seem relatively trivial, 1.000.000 ISK fines, the principles at issue under Article 6 are most assuredly not. Initiating criminal cases with first instance guilty judgements is in principle a grave breach of Article 6. This is particularly unacceptable as the judgement in their case may be considered to be a precedent that authorizes Contracting States to deprive criminal case defendants of all their rights in the first instance, as long as they are granted a forum to appeal such convictions on both points of fact and law. This cannot be correct and if it is, it seriously undermines the protection of all the rights provided by Article 6 in the first instance. This is particularly true to with regards to the right to presumption of innocence.

The Supreme Court's ability to remedy wholescale violations of Article 6 in the first instance with a conviction judgement.

40. The Court has consistently underlined the particular importance of first instance proceedings in criminal cases under Article 6, see e.g. paragraph 84 of *Krombach v. France* (no. 29731/96) and paragraph 40 of *Jussila v Finland* (no. 73053/01). At paragraph 32 of *De Cubber v Belgium* (no. 9186/80) the Court explicitly stated that the purpose of the Article 6(1) ECHR was to provide fundamental guarantees of all the rights of the Article, "*primarily in the first instance*", but also in the second instance.

41. In *De Cubber,* the Court found that those rights "*included*" impartiality. The judgement also explicitly referred to "*fundamental guarantees*" afforded to accused persons (in plural). It also stated that if first instance courts were

exempt from affording those rights in the first instance, that "*result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.*" However, the Court stated at paragraph 33 of *De Cubber* that there were "*some circumstances*" where a court of appeal could cure violations of a first instance court and that such a "*possibility certainly exists*".

42. The above clearly indicates that the instances in which an appeal court may cure violations of first instance court of Article 6 are to be considered *exceptional*. They should be subject to *narrow construction*, so as to re-enforce the protection of rights under Article 6 in the first instance.

43. At paragraph 64 in the Second Section's judgement in this case, it compared this case to *De Cubber* in the following manner: "*the Court* [in De Cubber] *found that a fundamental defect involving the actual composition of the national court, a matter relating to the internal organisation of the judicial system, was such that the court of appeal was not in a position to cure such a defect in the proceedings on appeal. In contrast, the present case is limited to defects in the conduct of proceedings before the District Court and is thus not of such a nature as to call into question the Supreme Court's ability to remedy the defects on appeal*", (see paragraphs 61-63).

44. The Second Section thus found that one particular defect, relating to the first instance court's perceived lack of impartiality, could not be cured upon appeal (*De Cubber*), but that a *total deprivation of rights* in the first instance could be cured by appeal proceedings (this case). The applicants respectfully submit that this conclusion cannot be a correct interpretation of the Court's case-law.

45. First, it is of crucial importance that *no trial took place* in the first instance in this case, unlike in the *De Cubber* case (or the *Sejdovic* case). It is therefore incorrect that the first instance violations were limited to "*defects in the proceedings before the District Court*". The undisputed fact is that no "*proceedings*" were "*conducted*" at all against the applicants, prior to the first instance conviction judgement.

46. Second, the position of the applicants was indisputably worse than in the case of traditional one-instance criminal proceedings. In such proceedings, indictments are served and defendants are presumed innocent, until proven guilty. In this case, the applicants were forced to initiate appeal proceedings

themselves from a position of having already been convicted without a trial, forced to disprove the facts put forth in the conviction judgment etc.

47. Third, if the judgement of the Second Section were correct, Contracting States would have a better possibility of remedying defects in appeal proceedings if they granted defendants *no rights at all* in the first instance (this case) than if they were granted *limited* rights (*De Cubber)*. Such a finding would encourage a complete deprivation of rights in the first instance by Contracting States and undermine the protection of rights afforded under Article 6.

48. Fourth, if an appeal court *upholds* a conviction, the first instance violations have not been remedied, see e.g. paragraph 54 of *De Haan v. the Netherlands* (no. 22839/93), where the Court found that a national appeal court had not cured a first instance defect "*since it did not quash on that ground the judgment of 29 June 1979 in its entirety*".

49. Fifth, the distinction drawn by the Second Section between different types of violations of Article 6 in the first instance and the appeal court´s ability to cure them, is inconsistent with jurisprudence of the Court.

50. In *T v. Austria* (no. 27783/95), the defect in the first instance proceedings had nothing to do with matters relating to the "*composition*" of the first instance court. There had been a failure by the court of first instance to inform a suspect of his alleged criminal conduct prior to handing down a conviction judgement in the first instance (much like in this case). At paragraph 68 of the judgement the Court stated: *"The applicant maintained that his defence rights, in particular his rights under Article 6 § 3 (a) and (b), were violated in that the District Court, before imposing a fine for abuse of process on him, did not inform him of the suspicion that he had made false or incomplete statements in his legal aid request. He claims that, thereby, he could not duly defend himself*". At paragraph 71 the Court came to the conclusion that the defect could not be cured with appeal proceedings as 1) the appeal court *confirmed* the first instance´s court´s fine "*and*" 2) rejected the argument as "*new facts which were inadmissible on appeal*". The reasoning for the inability to cure the violations of Articles 6(3) a) and b) was therefore twofold and clearly included the fact that conviction was upheld.

51. Reference is also made to paragraph 39 of *Weber v Switzerland* (no. 11034/84). There, the Court found that appeal proceedings were not capable of remedying the lack of "*a public hearing in the determination of the "criminal charge" against him*". The applicants were deprived of *public hearings* by the court of first instance, like *Weber*.

52. Sixth, there are legitimate suspicions as to the impartiality of the first instance court in this case, like in *De Cubber*. Judge Sigvaldason fined the applicants without granting them any rights under Article 6, e.g. the right to object or explain themselves. A logical conclusion is that the judge in question was biased against the applicants and had preconceived notions of their guilt from the moment he was assigned to the case of their ex-clients. It follows that the Supreme Court is not able to remedy the violations of Article 6 in the first instance.

53. Seventh, the Supreme Court's judgement in this case has already had negative effect on the protection of human rights under Article 6 in the first instance within Iceland. In a subsequent Supreme Court case, no. 487/2014 ("*Prosecution v Stefán Karl Kristjánsson*") (Exhibit 1), the Supreme Court upheld a first instance conviction in a criminal case where no prior proceedings were conducted, purely with reference to the fact that the defendant had enjoyed the right to appeal on both points of fact and law. There is therefore considerable danger of the Supreme Court's judgement being used as a precedent for violation of rights in the first instance being entirely irrelevant. This, in turn, will no doubt lead to further violations of human rights in the first instance within Iceland.

54. Eighth, when an obligation of a State affects a certain group of people, e.g. attorneys and judges, and not only a particular applicant, a case can be considered *"exceptional"* and be granted a referral under Article 43 of the ECHR, see *F.G. vs Sweden* (no. 43611/11), at paragraph 82. The case referred to above, no. 487/2014, involved a procedural fine for contempt of court against an attorney that had not enjoyed any rights in the first instance. It is therefore clear that the judgement in the case against the applicants will be used in the future as a justification to deprive attorneys of their rights to defend themselves against such fines, under Article 6, in the first instance.

55. In conclusion, if the judgement of the Second Section is allowed to stand, it will undermine the Court's previous jurisprudence on the importance of first instance proceedings under Article 6 and effectively create an incentive for Contracting States to entirely deprive criminal case defendants of their rights in the first instance. It will also lead to an erosion of rights at the first instance if appeal courts are allowed to cure breaches in the first instance, merely by upholding convictions. Further, the judgement seems to be inconsistent at best with the Court's previous jurisprudence and urgent clarification is needed on when an appeal court can cure first instance breaches by upholding convictions. Finally, the applicants underline that their position was incomparable to traditional one-instance court proceedings in criminal cases. They were forced to initiate an appeal case themselves from a position of having already been found guilty by a first instance court. That defect can never be cured merely by appeal proceedings.

The forum to give statements and have witnesses examined before the Icelandic Supreme Court.

56. At paragraph 88 of *Ramos Nunes de Carvalho e Sá v Portugal (no. 55391/13 57728/13 74041/13),* the Grand Chamber noted that the elements of an oral hearing before a first and only instance court must be composed of both witness proceedings and oral pleadings, "*unless there are exceptional circumstances that justify dispensing with such a hearing*". The Grand Chamber went on to list the situations when such a hearing, was "*necessary*", at paragraph 191 of the judgment:

> "*By contrast, the Court has found the holding of a hearing to be necessary, for example:*
>
> *(a) where there is a need to assess whether the facts were correctly established by the authorities [...] (b) where the circumstances require the court to form its own impression of litigants by affording them a right to explain their personal situation, on their own behalf or through a representative [...] (c) where the court needs to obtain clarification on certain points, inter alia by means of a hearing.*"

57. In its judgement in this case, the Second Section noted that there were two possibilities for the applicants to request witness examinations before the Icelandic Supreme Court, according to "*unequivocal statements*" on Icelandic law in the Supreme Court's judgement. First, that the applicants were able to initiate a witness case before a district court and submit transcripts of those proceedings before the Supreme Court, under Article 141(1) of the CPA.[1] Second, that the applicants were able to request that testimonies were taken before the Supreme Court itself under Article 205 of the CPA.
58. Respectfully, the applicants submit that the Supreme Court's "*unequivocal statements*" on the possibilities of case-parties to request testimonies are quite obviously both "*arbitrary and manifestly unreasonable*". The statements are inconsistent with the wording of the legal provisions in question themselves and decades of undisputed practice before the Icelandic Supreme Court. Further, the government itself has admitted that the rights in question "*do not exist*" and are "*illusory*", in an official report on the Icelandic judicial system. The applicants also express their surprise that the Court does not consider itself to be in a position to assess whether the alleged forum to conduct witness proceedings is "*practical and effective*", as required by the ECHR.

Testimonies in a witness case before a district court under Article 141(1) of the CPA.

59. Respectfully, the applicants consider the reference by the Supreme Court to Article 141(1) of the CPA in the context of this case to be absurd. Article 141(1) provides for a right to initiate a specific "*witness-case*" before a court of first instance, i.e. not before the court that determines guilt or innocence in the criminal case itself, the Supreme Court of Iceland. It would then be for them to have witness statements put into the form of written transcripts and to submit them before the Supreme Court.
60. First, there is no right for applicants to give their *own statements* under Article 141(1) of the CPA, but only to have *witness proceedings* conducted before a

[1] The Criminal Procedure Act No. 88/2008 ("*Lög um meðferð sakamála*"), cf. paragraph 32 of the Second Section's judgement.

district court. For that reason alone, the possibility of bringing a witness case under Article 141(1) of the CPA does not cure the breach of Article 6.

61. Second, and more importantly, it is a fundamental right of a defendant under Article 6 ECHR to be afforded the right to examine witnesses and testify before the actual court that is handling the criminal case in question and determining his or her guilt or innocence. In this case that would be the *Supreme Court* and not a *district court* that has already convicted the applicants. It does not cure a violation of rights by a first instance court under Article 6 to have, at best, a theoretical possibility to have witness proceedings conducted before a district court, after a conviction by that very court has already taken place.
62. Third, the government has not pointed to a single instance in Icelandic legal history of this alleged right being exercized in lieu of having testimonies heard before the Icelandic Supreme Court. It therefore follows that even if the right existed, they would neither be *practical* nor *effective* under Article 6(3) d).
63. In the view of the applicants, the alleged legal possibility to conduct witness proceedings is an invention by the Supreme Court, in order to enable it to convict them, without quashing the first instance judgement.

Testimonies before the Supreme Court itself under Article 205 of the CPA.

64. The Second Section judgement stated that it was possible for the applicants to have testimonies taken before the Supreme Court and that they had not exercized those rights. At paragraph 69, the Second Section found that the Supreme Court had not been under an obligation to invite them to exercize this alleged right:

> *"Article 6 of the Convention did not require the Supreme Court in the present case to act ex proprio motu and invite the applicants to give statements or have witnesses examined. As previously mentioned, (see paragraph 62 above), in cases where an accused has been convicted in absentia at first instance, it is for the appellate court to provide a forum for the fresh factual and legal determination of the merits of the criminal charge. It is then for the accused to avail themselves of the remedies for their defence that are provided for by domestic law".*

65. The applicants, who each have decades of experience operating within the Icelandic court system both as litigators and *ad hoc* judges, find the suggestion that it was possible for them to request testimonies before the Supreme Court to be very surprising to say the least. They submit that neither they nor any other Icelandic citizen could have realized that the alleged rights were in existence.

66. First, it has been established, both by the Court's own jurisprudence (*Arnarsson v Iceland (no. 44671/98)*) and by the parties' submissions in this case, that such rights are neither in existence nor practical and effective. The following is undisputed between the parties:

    1. That according to the wording of Article 205 of the CPA it is the Supreme Court (and not case-parties) that may request testimonies before it: "*The Supreme Court can decide ...*";
    2. That criminal case defendants have never exercised the alleged right to call witnesses in Icelandic legal history;
    3. That in the only case testimonies were heard, it was at the request of the Supreme Court itself, which again is in line with the definitive wording of Article 205 of the CPA (..."*The Supreme Court can decide* ";
    4. That the Icelandic State itself has referred to the rights of case-parties to call witnesses before the Supreme Court as being "*non-existent*" and "*illusory*" in an official report on the Icelandic judicial system.[2]
    5. That the applicants never waived nor were asked to waive the rights to call witnesses or to give statements themselves to the Supreme Court.

67. It should have been unavoidable for the Second Section to conclude, in light of 1-5 above, that no "*practical and effective*" forum had been provided for witness proceedings to take place before the Supreme Court.

68. Further, in light of the fact that the applicants were a) entirely deprived of the right to conduct testimonies in the first instance and b) as nobody had exercised the alleged rights in Icelandic legal history, the Second Section should have put the onus on the government to ensure the effectiveness of the rights, i.e.

[2] See report, dated 1 September 2008, submitted with complaint to the Court, as annex 17, at pages 187-235 of complaint documents. See the applicants references to the report at paragraph 50-52 of the arguments with the complaint form.

the Supreme Court should have taken positive action to offer the applicants the alleged rights.

69. The applicants underline that Contracting States are required to show that the *methods* chosen by Contracting States to secure rights under Article 6 ECHR are *effective*, see paragraph 51 in *Salduz v Turkey (no. 36391/02):*

> *"Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective".*

70. In *Göç v Turkey,* the Grand Chamber assessed whether rights to request a hearing were "*effective*" under national law. That e.g. entailed assessing whether a hearing "*had any prospects of success*" under national law, see paragraph 48:

> *"The Court observes that the applicant's claim was examined by the Karşıyaka Assize Court and then on appeal by the competent division of the Court of Cassation. At no stage was he afforded an opportunity to state his case orally before the domestic courts. Although the Government contend that the applicant could have requested the Court of Cassation under Article 438 of the Code of Civil Procedure to hold a hearing, it is not persuaded that any such request would have had any prospects of success [...]"*

71. The Second Section in this case should have assessed whether the right to conduct testimonies before the Supreme Court was *effective* under the Convention (cf. *Salduz v Turkey)* and whether such a request would have had "*any prospects of success*" (cf. *Göç v Turkey*). Further, if any real assessment of *effectiveness* and/or *prospects of success* would have taken place, it would have been relatively quick and easy for the Court. The government has explicitly admitted that the rights in question *do not exist* in the report cited above in paragraph 66 and that the rights have never been exercized in Icelandic legal history. The applicants presume that there cannot be many

clearer examples of non-effectiveness of rights than this one. Even a cursory examination by the Court of the effectiveness of the rights under Icelandic would have sufficed.

72. If the Court ignores explicit admissions from governments on non-effectiveness of rights and avoids taking a firm position on violations, because of the margin of appreciation enjoyed by Contracting States, the requirement for "*effectiveness*" of rights has in reality become non-existent under the Convention.

73. Further, the applicants submit that the judgement in their case is also inconsistent with the Court's judgement in *Sigurþór Arnarsson v Iceland,* where the Court took a clear position on the compatibility of Icelandic Law with the Convention and found that there had been a "*positive duty*" to afford a criminal case defendant the opportunity to lead witnesses and have his own testimony taken before the Supreme Court, in particular as the issues to be determined by it were "*predominantly factual in nature*" (paragraph 34) and because the Supreme Court had not heard the applicant "*directly*" (paragraph 35). The Court also found that "*in the light of the wording of Article 159 (4) of the Code of Criminal Procedure, that the applicant could reasonably have expected the Supreme Court to summon him and other witnesses to give oral evidence*".

74. It is specifically worth noting that there is no difference in the wording of Article 159(4) of the previous Code of Criminal Procedure and the wording of the current Article 205(3) of the Criminal Procedures Act No. 88/2008, as regards the right to summon witnesses before the Supreme Court. Further, the Supreme Court in this case had not heard the applicants' testimonies "*directly*". Therefore, the situation of the applicants and *Arnarsson* was in all material aspects the same.

75. Further, the applicants underline that the issues in their case were to a very large extent "*factual in nature*", as is generally the case with contempt of court cases. It needed to be clearly established in the case what exactly the offensive behavior was, who was offended by it and whether the behavior was objectively justified, in light of the trial proceedings in question. This was particularly important as judge Guðgeirsson heard a motion to fine but rejected it, according to news reports from the court hearing. As can be seen by

paragraph 14 of the Second Section judgement, the government explicitly argued that there was "*great uncertainty*" as to the facts relating to judge Guðgeirsson's rejection in the 11 April 2013 hearing:

> "*Before this Court the applicants submitted that, according to news reports, the presiding judge had explicitly rejected the prosecution's request, stating that the conditions to impose fines were not fulfilled at that time. However, the Government stated that the court records (which were not submitted to the Court) did not reflect that the presiding judge had taken a position on this point. In any event, the Government argued that the statement had not been a formal one, it had not been noted in the court records and there was great uncertainty as to whether it had been made and, if so, what had actually been said.*"

76. By way of further example, there was also a factual dispute as to whether any *harm* was caused to the applicants' ex-clients' interests, by the applicants' non-attendance at the 11 April 2013 hearing, as per the reasoning of the Reykjavik District Court for the fine. The applicants wished to demonstrate by way of oral testimonies that their ex-clients had accepted their resignations and themselves chose to have new counsel represent them in the case. They were therefore not harmed by changing counsel. Further, the applicants wished to demonstrate by oral testimonies that no trial date had been accepted, neither by them nor their ex-clients, and therefore that no delay was caused by their non-attendance at the 11 April 2013 hearing. The applicants also wished to appear before the court determining their guilt in person, to demonstrate their credibility and explain the factual reasons for their resignations.

77. In light of the above, the findings of the Court in *Arnarsson* are thus in direct contrast to the findings of the Second Section in this case. The Court has previously expressed an opinion on substantively the same legal provision in *Arnarsson* and found that the government was under a positive duty to ensure the effectiveness of rights under Article 6(3) d).

78. It is also worth noting that in the *Arnarsson* case the onus was on the State to demonstrate that it had provided *effective* protection of rights to testimonies under Article 6(3) d), as per the wording: "*...no special features to justify the*

fact that the Supreme Court did not summon the applicant and certain witnesses" (paragraph 38 of the judgment).

79. Further, Article 6 of the ECHR cannot offer less guarantees as to the right to call witnesses before an appeal court, if *no criminal proceedings at the lower level* took place at all (this case), than if a trial took place in the first instance, where testimonies were taken (the *Arnarsson* case). Therefore, if the Supreme Court had a positive obligation to summon the applicant and certain witnesses in the *Arnarsson* case, it must have had that same obligation towards the applicants.

80. The applicants also refer to *Botten v Norway (no. 16206/90)*. There, the Court found that the Norwegian Supreme Court had been under a *positive obligation* to ensure the effectiveness of the right of a defendant to testify before the Court under Article 6(3)(d) ECHR, *despite* the facts of that case being in principle undisputed and the Supreme Court appeal *only turning on points of law*.

81. Moreover, the applicants refer to *Sakad et al v Turkey, no. 29900/96, 29901/96, 29902/96, 29903/96*, on the obligations of Contracting States to take positive steps to ensure that rights under Article 6 are enjoyed in an effective manner, see paragraph 67:

> *"In any event, paragraph 1 of Article 6 taken together with paragraph 3 requires the Contracting States to take positive steps, in particular to enable the accused to examine or have examined witnesses against him (see Barberà, Messegué and Jabardo v. Spain, judgment of 6 December 1988, Series A no. 146, p. 33, § 78). Such measures form part of the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 are enjoyed in an effective manner (see Colozza, cited above, ibid.)."*

82. Finally, turning again to the criteria put forth in *Ramos Nunes de Carvalho e Sá v Portugal,* it is clear that the applicants had a right to have oral testimonies taken 1) on whether the facts were correctly established, 2) for the court to the court to form its own impression of the applicants, 3) for a clarification on certain factual points, e.g. on the events of the 11 April 2013 court hearing.

83. In light of the fact that the rights to conduct testimonies before the Supreme Court did not exist according the wording of the legal provision in question

and had never been exercized by any case party in Icelandic legal history, and as the applicants were deprived of their rights in the first instance, the Supreme Court was under a positive duty to offer testimonies to the applicants.

Conditions for referral under Article 43 ECHR.

84. In summary the applicants submit that the case should be granted a referral to the Grand Chamber under Article 43 of the ECHR for the following reasons:

1. It is a an issue of critical importance under the ECHR that each violation of Article 6 ECHR is considered on its own merits, particularly when there is no trial in the first instance and a wholescale deprivation of rights occurs, see *Göç v Turkey.*
2. The Second Section judgement raises serious questions affecting the interpretation or application of the Convention on the *presumption of innocence* under Article 6 (1)-(2) if a Contracting State is allowed to only offer one stage of court proceedings to a defendant and in those proceedings the defendant starts the proceedings from a position of guilt;
3. The Second Section judgement raises serious questions on whether a national appeal court is able to remedy violations of the right to presumption of innocence, merely by providing a fresh appeal forum, if the first instance conviction took place without a preceding trial or criminal investigation;
4. The Second Section judgement raises serious questions of general importance on what importance the Court attaches to first instance proceedings in criminal cases;
5. An urgent clarification of the Court´s jurisprudence is needed on a national appeal court´s ability to remedy first instance violations of Article 6, with conviction judgements;
6. An urgent clarification of the Court´s jurisprudence is needed on whether a national appeal court is able to remedy wholescale violations of Article 6 in the first instance, but unable to remedy more limited faults in a first instance, e.g. suspicions of partiality;
7. The Second Section judgement raises serious questions of general importance as to whether Contracting States are still under an obligation to ensure that rights protected under Article 6 are "*effectively*" ensured;

8. The Second Section judgement raises serious questions of general importance as to what the role of the Court is in ensuring the "*effectiveness*" of rights, if it does not include a substantive assessment of the a) wording of legal provisions, b) undisputed decades of non-practice and c) an explicit admission from a government in public reports of rights being "*non-existent*" and "*illusory*",
9. An urgent clarification is also needed of the inconsistency between the Second Section judgement and the Court's previous finding of on the Icelandic Supreme Court's duty in *Arnarsson v Iceland* to take positive action to offer a criminal case defendant the right to conduct testimonies.
10. Finally, the applicants urge the Grand Chamber to consider the implications of the Second Section judgement in a larger perspective. It would be a matter of grave consequence for the protection of all Article 6 rights if Contracting States were allowed to convict in criminal cases in the first instance without any preceding investigation or trial and particularly so with regard to the fundamental right to presumption of innocence. It would open the door for a wholescale deprivation of all rights of criminal case defendants in the first instance in all manner of criminal cases, where the allegations are generally much more serious than the ones in this case. The Second Section has set a particularly dangerous precedent for the protection of human rights in the Contracting States. It cannot be allowed to stand as a matter of principle as it may have serious ramifications for the protection of Article 6 rights in Contracting States.

Findings of the Second Section of non-violation of Article 7 ECHR

Introduction.

85. In its jurisprudence on the requirements of Article 7 of the ECHR, the Court has established that both "*offences and the relevant penalties must be clearly defined by law*", see e.g. paragraph 79 of *Del Rio Prada v Spain (no. 42750/09)*.

86. The applicants *inter alia* argued in their applications that the judgment of the Supreme Court in their case lacked foreseeability under *available case law* in Iceland on amount of fines for contempt with the court (see paragraphs 89 of their applications).

87. In this instance, the Second Section found that the case against the applicants was "*the first of its kind brought before the Supreme Court on appeal due to the in absentia imposition by a District Court of fines under the CPA on defence counsel who had resigned from their positions in disregard of the orders of the trial court*" (paragraph 92). The fines imposed on the applicants were "*substantially higher than previously imposed fines under Section 223*", but the case was "*the first of its kind*". Therefore, it found that prior Icelandic jurisprudence on fine amounts for contempt of court was irrelevant. It sufficed that the Supreme Court had considered the "*nature and gravity of the applicants' actions*" before levying the fines (paragraph 94 of judgment). The applicants disagree with this reasoning and submit that this sets a dangerous precedent for the protection of rights under Article 7 ECHR.

88. First, it cannot be a justification for the uniqueness of the case or the uniquely high amount of their fines that the applicants were convicted *in absentia* in the first instance, as suggested in paragraph 92 of the Second Section judgement. A Contracting State may not rely on its own breach and use it to characterize a case as "*unique*" or the "*first of its kind*". The fact that the applicants were absent, through no fault of their own, when the judgement was handed down, is therefore irrelevant for the purposes of assessing whether the amount of the fines were foreseeable under Article 7 ECHR.

89. Second, it must be emphasized that every litigation has unique aspects to it. If a case is entirely identical to another case, it will presumably not be brought before a court, as it has effectively been decided by another precedent.

Describing a case as "*unique*" is a convenient way for a government to avoid comparison with unfavorable prior jurisprudence on foreseeability.

90. Third, in the view of the applicants, the only two "*unique*" factors in this case are a) the unprecedented severity of the punishment for contempt of court, b) the unprecedented and wholescale violations of the applicants' rights under Article 6 in the first instance.

91. Fourth, as is clear from the wording of Article 223 of the CPA, it does not apply to a resignation of defense counsel in disregard of alleged orders of the trial court, as suggested by the Second Section. This can also be seen by the fact that the applicants were released from their positions by a court ruling of 11 April 2013, without any fine being imposed (see paragraph 13). They were, however, fined by the Supreme Court as defence counsel for *non-attendance* at first instance trial, which allegedly caused a *delay* in trial proceedings.

92. The conduct for which they were fined was therefore not as "*unique*" as the government submits. In a subsequent Supreme Court case, no. 487/2014 ("*Prosecution v Stefán Karl Kristjánsson*") (Exhibit 1), a fine for contempt of court was handed down against a defence attorney for both non-attendance at trial and causing a delay in trial proceedings, in violation of "*repeated instructions*" of a district court judge. The fine levied against the attorney amounted to 50.000 ISK, which is 1/20 of the fines levied against each of the applicant for similar offences. Non-attendance by counsel at trial, which serves to delay proceedings is not a particularly unusual offence and will presumably occur on a regular basis in the ordinary operations of a judicial system.

93. Fifth, it is undisputed that at the time of the judgement, the fines levied against the applicants were ten times higher than the highest fine in Icelandic legal history for contempt of court (100.000 ISK) and two thousand and five hundred times higher than the lowest fines levied (400 ISK), see paragraph 89 of the complaints to the Court, which list the relevant jurisprudence as follows:

    1. **Supreme Court Judgement ("*SCJ*"), 1954, page 603:** 500 ISK
    2. **SCJ 1958, page 602:** 500 ISK
    3. **SCJ 1959, page 634:** 500 ISK
    4. **SCJ 1960, page 289:** 400 ISK
    5. **SCJ, 1975 page 989:** 5.000 ISK
    6. **SCJ, case no. 318/2004:** 40.000 ISK

7. **SCJ, case no. 352/2010:** 80.000 ISK
8. **SCJ, no. 292/2012:** 100.000 ISK
9. **SCJ, no. 710/2012:** 100.000 ISK

94. As can be seen from the description of facts in the above judgements themselves the facts of each case are different, but the fine amounts are nevertheless internally consistent. A gradual increase in amounts seems to have occurred with time, but there were no arbitrary fine amounts, i.e. until the fines were handed down against the applicants.
95. Therefore, given the range of fines for contempt of court levied in Icelandic history and in light of the very gradual evolvement of the jurisprudence on fine amounts, the applicants could not reasonably have expected to be fined 1.000.000 ISK at the time the fine was handed down.
96. Further reference is made to Supreme Court case, no. 487/2014, where a fine for non-attendance was determined at 50.000 ISK. While that judgement had not been handed down at the time of the judgement in the applicants case, it clearly shows that there is a range of fines that an attorney can expect for contempt of court and that fines amounting to 1.000.000 ISK are entirely arbitrary.
97. Sixth, judging from judge Guðgeirsson´s actions in the case, in particular a) the fact that he did not fine the applicants, and b) his release of the applicants from their obligations as defence counsel at the request of their ex-clients, he in no way considered the applicants conduct to be *uniquely* offensive.
98. Seventh, the Second Section only characterized the case as "*unique*", but did not conduct a substantive assessment of domestic law as a whole or how it was applied at the time of the fine, as it was obligated to, see paragraph 96 of *Del Rio Prada v Spain (no. 42750/09)*. It should have concluded that there was no maximum limit to the fine amounts in the CPA and that further contributed to the legal uncertainty of the fine amounts and increased the obligation of the government to ensure that fine amounts did not depart dramatically from jurisprudence.
99. Eighth, the fine amount for contempt of court is also higher in international comparison than could be reasonably have been expected at the time, see e.g. the court´s judgements in the following cases:
    - *Weber v Switzerland (no. 11034/84)*: 300 Swiss franks.

- *Ravnsborg v Sweden (no. 14220/88)*: 1.000 Swedish kroners.
- *T. v Austria (no. 27783/95)*: 30.000 Austrian schillings.
- *Kyprianou v Cyprus (no. 73797/01)*: 130 euros.
- *Alenka Pečnik v Slovenia (no. 44901/05):* 626 euros.

100. Ninth, the complete disregard of the applicants' rights under Article 6 ECHR by judge Sigvaldason in the first instance, shows that contempt of court fine cases were not traditionally viewed as *criminal* in nature, by Icelandic courts. In other words, the wholescale deprivation of Article 6 rights in the first instance, further shows that the amounts of fines are *extraordinarly high* compared to Icelandic jurisprudence on contempt of court fines.

101. In light of the above, the levying of fines that were ten times higher than the highest fine in Icelandic legal history for contempt of court and 2.500 time higher than the lowest amount, was *not* a gradual evolvement of jurisprudence for contempt of court fines and was not foreseeable. The punishment was arbitrary, as can also be seen by later jurisprudence for similar offences, where an attorney was fined 1/20 of the fines levied against each of the applicants.

102. The applicants refer to their original complaints to the Court on their other arguments in relation to Article 7 violations.

Conditions for referral under Article 43 ECHR.

103. The applicants submit that national courts should not be allowed under Article 7 ECHR to hand down fines that are grossly inconsistent with previous jurisprudence, with the sole argument that a case is "*unique*". This is particularly true when there is no maximum fine amount prescribed by national law. It would set a particularly dangerous precedent for the future protection of rights under the Article 7 ECHR.

104. Further, as argued above, this case is very clearly not unique enough to warrant ignoring all Icelandic jurisprudence on fine amounts in contempt of court cases. The offences in question, non-attendance at trial and causing delays, would appear to be relatively common occurrences in the normal operations of a national court-system.

105. For the future protection of rights under Article 7, the Second Section should be obligated to conduct a real assessment of the "*domestic law as a whole*",

and whether the severity of the punishment was a "*gradual*" evolvement of the fine amount or an arbitrary mutation of previous case-law.

106. Further, the outcome of the Article 7 complaint is bound to have legal repercussions in Contracting States to the Convention. The Supreme Court judgement in the case of the applicants has already had considerable impact on Icelandic criminal law, i.e. it now seems to be established jurisprudence that criminal case defendants and/or attorneys that may be subject to fines for contempt of court have no rights in the first instance so long as they enjoy the right to appeal. The judgement is likely to have a similar impact under Article 7 within Iceland.

107. Further, attorneys may e.g. be fined for contempt of court under Norwegian procedural law and there are no limits to the amount of those fines prescribed under the Act, similarly to Iceland.[3] This case would therefore serve as a precedence for protection of rights under Article 7 ECHR in that Contracting State. Moreover, the Court's judgements on fines for contempt have, historically speaking, lead to legislative amendments within Contracting States. For example, in 2005, following the judgement of the Court in *Kyprianou v Cyprus (no. 7379/01),* the provisions of the older Danish Procedural Act on fines for attorneys for contempt of the court were abolished.[4] The applicants also refer to the cases of the Court cited in paragraph 99 above. This shows that other Contracting States consider these types of cases to have a general effect on their own legislative order.

108. Finally, a judgment on the Article 7 complaint may have effect on national court interpretation and application of national legislation and further serve to clarify the rights and obligations attorneys and judges have as servants of national justice systems. The Court has found that when an obligation of a State affects a certain group of people, e.g. attorneys and judges, and not only a particular applicant, a case can be considered *"exceptional"* and be granted a referral under Article 43 of the ECHR, see *F.G. vs Sweden (no. 43611/11)*, at paragraph 82.

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[3] See § 200 of the Norwegian Act on Courts and Court Proceedings ("Lov om domstolene"), LOV-1915-08-13-5.

[4] Report by the Ministry of Justice available at https://www.ft.dk/samling/20061/almdel/reu/bilag/228/335391.pdf, see pages 7-9 for the reaction of the State following *Kyprianou v Cyprus*.

109. In light of above, the conditions for referral to the Grand Chamber are met under Article 43 ECHR, both with regards to Second Section´s findings of non-violations of Articles 6 and 7 of the ECHR.

Sincerely,
on behalf of the applicants

Geir Gestsson,
Supreme Court Attorney

signed on:

22 January 2018