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Reykjavík May 14, 2019

Subject: Case of Guðmundur Andri Ástráðsson v. Iceland (Application no. 26374/18)

Request for Referral to the Grand Chamber

1. We have the honour of confirming receipt of your letter dated 12 March 2019 informing the Government of Iceland of the judgment in the case *Guðmundur Andri Ástráðsson v. Iceland* that same day. The Government hereby requests the referral of this judgment to the Grand Chamber in accordance with Article 43 of the European Convention on Human Rights and Rule 73 of the Rules of Court.

2. The Government maintains that the requirements provided for in Article 43 are fulfilled. The judgment raises serious questions affecting the interpretation and application of the Convention and also raises serious issues of general importance both in Iceland and Europe in general. The Government is of the opinion the judgment raises several questions of principle of immense importance, both for the Icelandic legal system as well as other contracting parties, and there is, therefore, a need for the Grand

Chamber to decide on them. The Government respectfully disagrees with the judgment of the majority of the Chamber on multiple grounds.

3. On the following basis the Government kindly asks the Panel of the Grand Chamber to accept its request that the case be referred to the Grand Chamber.

I. Exceptional Case

4. The judgment in the case of *Guðmundur Andri Ástráðsson v. Iceland* was published 12 March 2019. The Court held, by five votes to two, that there was a violation of Article 6 § 1 of the Convention as regarded the right to a tribunal established by law. The case deals with the appointment of fifteen judges to the new Court of Appeal in Iceland, *Landsréttur*. The core of the Court's reasoning concerns the breaches of national law by the Minister of Justice in the process of appointing four judges, who the Minister placed on her own list of candidates instead of other four candidates proposed by the Evaluation Committee. However, the Court concludes that the failure of the Parliament to comply with the temporary provision IV of the new Judiciary Act No. 50/2016 and vote separately on each candidate also amounted to a serious defect in the appointment procedure.

5. The Government is of the view that the case should be considered an exceptional case, *cf.* Article 43 § 1, for the following reasons. Firstly, it will be argued below that both of the criteria of Article 43 § 2 are fulfilled in this instance. The case raises questions of principle about how the requirement of a "tribunal established by law" in the sense of Article 6 § 1 should be interpreted. This is not only the opinion of the Government, but also of the two judges who wrote the joint dissenting opinion. Furthermore, the results of the judgment could have a tremendous impact on and become very serious for the Icelandic legal system if the Icelandic Supreme Court were to change its previous ruling regarding the legitimacy of judgements stemming from the judges in question. The Government has endeavoured to abide by the judgments of the Court and fulfil its obligations in accordance with the Convention. The present judgment raises serious issues for the Iceland legal system, as will be explained below, and is vague on a crucial point. Not only that, the Government is of the opinion that the issues raised in the judgment are of importance and can have a great effect for other

contracting parties. In this regard, the Government draws the attention to paragraph 10 in the joint dissenting opinion, where the consequences of the judgment are discussed.

6. Secondly, the Court has already considered the case a potentially leading case, *cf.* its letter 21 June 2018, where the Court invited the Government to submit its statements and observations to the Court. The Government acknowledges that the Court has dealt with several cases concerning the existence, composition and jurisdiction of national courts, but, as far as the Government can see, none that concerns irregularities in the administrative procedure of appointing judges. Accordingly, the Government agrees with what it says in the aforementioned letter that this is a potentially leading case. It could also be considered a "new case". Therefore, it has the potential of being an important precedent.

7. Thirdly, as will be argued below, the majority of the Chamber develops the Court's case-law in a new direction and deviates from established case-law by introducing a "flagrant violation" test not linked to the interpretation of domestic law or the other contexts it has been used in before. It is important for Iceland, as well as other contracting parties, that the Grand Chamber takes a stance on this new test. It is foreseeable that national courts will be called on, in not too of a distant future, to decide on issues raised by the judgment. Thus, a clear and decisive ruling from the Grand Chamber on how to address such issues is necessary.

8. In the light of this and what will be further argued below, the Government is of the view that the intervention of the Grand Chamber is needed as the case, by its nature and by the nature of its legal, social and political implications, is capable of having a serious impact on the future interpretation and application of the Convention as well as raising serious questions for the Icelandic legal system.

II. A Serious Question Affecting the Interpretation and Application of the Convention

9. The Government is of the view that the referral to the Grand Chamber should be accepted as the case raises serious questions affecting both the interpretation and the application of the Convention. There are, at least, two overarching serious questions

raised by the case affecting the interpretation of the Convention. Firstly, how should the requirement in Article 6 § 1 that a tribunal is "established by law" be interpreted? This applies especially to cases like this, where there are procedural irregularities in the appointment of judges but not "directly" in the later composition of the bench in an applicant's case. The majority of the Chamber introduces, as far as the Government can see, a new test of "flagrant violations" for these cases, which is not obviously or clearly in line with the Court's previous case-law on the requirement. It would, therefore, appear that the judgment departs significantly and importantly from the previous case-law of the Court. Secondly, the majority of the Chamber seems to use this new test to bypass the principle of subsidiarity and disregard the Supreme Court's conclusion about the legal effect of the irregularities on the legality of the composition of the bench in the applicant's case. These two questions will now be discussed before moving on to a serious question raised by the case about the application of the Convention.

The first serious question affecting the interpretation of the Convention.

10. According to the established case-law of the Court, as the Government understands it, the term "law" in Article 6 § 1 refers to domestic law, see *e.g.* paragraph 98 of the present judgment and *Lavents v. Latvia*, no. 588442/00, 28 November 2002. The question is, at least sometimes, whether a domestic law has been breached in such a way that it "would render the participation of one or more judges of a case irregular", see *e.g.* the previously mentioned paragraph and the cases cited there. Moreover, a violation by a tribunal of domestic legal provisions gives "in principle" rise to a violation of Article 6 § 1 of the Convention, see *e.g.* paragraph 100 of the present judgment and *DMD Group, A.S. v. Slovakia*, no. 19334/03, § 59, 5 October 2010. The question before the Court, as the Government views it, is, therefore, whether the participation of the judge A.E. in the applicant's case was irregular because of a breach of domestic law. What makes this case unique in comparison with the other cases the Court has dealt with is that the procedural irregularities established by the Icelandic Supreme Court happened sometime before the judge in question took part in the applicant's case. The situation was not, for example, a judge participating in a case in violation of applicable domestic law which was "in principle" also a violation of Article 6 § 1. Instead the situation was that the judge participated in the applicant's case *in accordance with domestic law* and the participation was not irregular according to

domestic law, see further on that below. In essence, this was the Supreme Court's conclusion in the applicant's case. Domestic law had not been violated by the participation of the judge in the applicant's case. The majority of the Chamber did not dispute this conclusion of the Supreme Court about domestic law, for example on the ground that it was arbitrary or manifestly unreasonable. Rather it went in a new direction. It based its conclusion on the ground that the violations of domestic law in the appointment of the judges should be assessed not according to domestic law but independently in light of Article 6 § 1 and this new test of whether the procedural irregularities amounted to a "flagrant violation". Regarding this approach, the government points to the following.

11. The initial question is how the requirement of "established by law" should be interpreted in cases like this. The Government submits that one interpretation is that the *legal effect* of a violation of domestic law *on the applicant's case* should be assessed *in accordance with domestic law* when deciding whether a court has been established by law. This test has several parts. First of all, there must be a violation of domestic law. Second of all, the legal effect of that violation must be assessed according to domestic law and that must be done in light of the effect of the violation according to domestic law on the applicant's case, provided there are adequate laws in place according to the criteria laid down in *Coëme and Others v. Belgium,* no. 32492/96, 21 May 1999. Only then is it possible to view the legal situation in its entirety, that is view both the violation and its *legal effect on the applicant's case*. Lastly, if the violation has legal effect according to domestic law for the participation of a judge in an applicant's case, then it should be assessed whether it is a violation of Article 6 § 1. As will be discussed below, the standard test until now has been that violations of national law are "in principle" also violations of Article 6 § 1. The second step in this approach is crucial for cases where the violation of domestic law does not "directly" occur or apply to the applicant's case, unlike the situation in many of the previous cases before the Court. In support of this interpretation, it should be borne in mind that the term "law" refers to domestic law. It stands to reason that it does not only encompass violations of domestic law but also the legal effects of those violations according to domestic law. Both need to be considered when deciding on the legal situation according to domestic law before assessing whether Article 6 § 1 has been violated. In the Government's opinion, it is, therefore, unconvincing if the legal effect of a violation on the applicant's case does not

matter at all. It should, at the very least, be taken into account. If this interpretation is accepted, then a procedural irregularity in the appointment of a judge could, according to domestic law, not affect on the establishment and composition of the bench and, therefore, not render the participation of a judge in the applicant's case illegal or irregular. It is important to be mindful that the question before the Court in this case is not whether domestic law was violated in the appointment procedure. It is whether the effects of the procedural irregularities were such that the court was not established by law within the meaning of Article 6 § 1 *in the applicant's case*. This is extremely important because the Supreme Court has established that the participation of A.E. in the applicant's case was not a violation of domestic law and the majority of the Chamber has not disputed that conclusion. The Government draws attention to the joint dissenting opinion, where the issue of the case is demarcated, *cf.* paragraph 2, where it states that the violations in question had consequences for other candidates but not the applicant's case, *cf.* paragraph 6, and that the assessment of consequences is a matter of domestic law, *cf.* paragraph 8.

12. The Government points to the fact that the majority of the Chamber did not apply the abovementioned interpretation or test but introduced the test of a "flagrant violation". According to this test, as the Government understands it, the legal effects of the violations should not be assessed first according to domestic law but immediately according to the test. The nature and gravity of the violation should be evaluated immediately according to the criteria laid down in this judgment. The violation of domestic law and the legal effect of the violation according to domestic law have been separated. According to this approach, violations of domestic law are not "in principle" also violations of Article 6 § 1, as has been established in the Court's case-law. That test is suitable where the legal effects according to domestic law render the participation of a judge in the applicant's case irregular, that is *illegal according to domestic law*. That test would never work when the violation of domestic law and the legal effect of that violation according to domestic law have been separated, which is the consequence of the approach taken by the majority of the Chamber. That would mean that almost all irregularities, how distant to the applicant's case or immaterial to it, would "in principle" violate Article 6 § 1. Clearly that would be unacceptable. According to the present judgment, the violation and legal effect are not only separated, resulting in widening the scope of the requirement, but the "in principle" test is abandoned for the

"flagrant violation test". The Government points out that the test does not seem to be whether the violations of domestic law were *flagrant according to domestic law*. Rather the test seems to be whether the violations of the domestic law, irrespective of their legal effects or significance according to domestic law, where *flagrant according to the criteria laid down in this case*. This seems to make the legal effects of a violation according to domestic law (almost) immaterial to whether Article 6 § 1 has been violated. This new approach extends the scope of Article 6 § 1 at the cost of domestic law. This also means that the Court is given significant leeway in assessing the effects of violations of domestic law according to Article 6 § 1. It should be pointed out that the Government cannot see from the present judgment that legal effects according to domestic law were taken into account at all in assessing whether the violations were "flagrant".

13. The Government is not aware that the "flagrant violation" test has so far been developed or applied as a test in this context. In this regard, the Government points to, firstly, that when the majority of the Chamber discusses the test (see paragraph 98), it only cites a Decision of the EFTA Court in Case E-21/16 of 14 February 2017, and the Judgment of the General Court in Case No. T-639/16 P of 23 January 2018, but not a previous judgment of the Court. It should be borne in mind that in the cited cases the courts were applying "European law", that is whether the courts were established by EEA-law and EU law respectfully, but not the more complex interplay of domestic law and Article 6 § 1 of the Convention. It is not obvious that the same kind of test should be used for these different situations. Furthermore, the violations in these cases were of a different nature, in the Government's opinion. Secondly, the minority of the Chamber points out in its joint dissenting opinion that "this test is applied in a context that was not the one for originally introducing such a test. Indeed, the "flagrant breach of domestic law" test, in its common understanding, applies to very different situations from the one at hand", *cf.* paragraph 7 of the joint dissenting opinion.

14. The majority of the Chamber discusses what the principle "established by law" entails in paragraphs 97-103 of the judgment. It states that the expression reflects the principle of the rule of law, *cf. i.a. Jorgic v. Germany*, no. 74613/01, § 64, ECHR 2007-III. Further, "law" within the meaning of Article 6 § 1 of the Convention comprises legislation providing for the establishment and competence of judicial organs, *cf. i.a.*

Lavents v. Latvia, no. 58442/00, § 114, 28 November 2002. It can be derived from the Court's established case-law that the main question is often whether or not the national court is established as a tribunal vested with the competence to act as tribunal according to national domestic law, *cf. Jorgic v. Germany*, § 64. If the tribunal does not have the competence to act as a tribunal in the actual case, according to domestic legal provisions, this would give rise to a violation of Article 6 § 1 of the Convention.

15. The Government points out from the foregoing that what gives rise to a violation of the Convention is the lack of *competence* according to domestic law. The Court has stated that it is necessary for the Court to examine "whether the national law has been complied with in this respect", *cf. Jorgic v. Germany*, § 65. The expression "in this respect" refers back to "the establishment and competence" according to "domestic legal provisions". Thus, even if national law has not been complied with in all respects, only those flaws that render the court without competence to act as a court in the actual case would give rise to a violation.

16. The Government notes that this is, however, a question that should be decided by national law. It goes without saying that the national courts are better placed when it comes to the interpretation of national law – also when deciding whether the national law has been complied with in respect to "the establishment and competence" of the court. As the Court itself has stated, "subsidiarity is at the very basis of the Convention"[1]. It is well established in the Court's case-law that the Court may not question the national court's interpretation of domestic law unless there has been a *flagrant violation* of domestic law.[2]

17. The Government notes, as also pointed out by the minority, that the majority of the Chamber deviates from established case-law by substituting the wording of the convention "tribunal established by law" with an erroneous "according to law" criteria. This is even the starting point in the Court's assessment of the present case, *cf.* paragraph 104. The majority of the Chamber thus deviates from the case-law substituting the assessment of the court's *competence* according to domestic law by an assessment of the *compliance with the procedural rules* in the administrative

[1] *Austin v. UK* (GC), no. 39692/09, § 61, 15 March 2012.
[2] *Cf. Jorgic v. Germany*, § 65, *Coëme and Others v. Belgium*, § 98, *Lavents and Latvia*, § 114.

proceedings leading to the appointment of judges. Thus, the majority disregards the essential threshold of "flagrant violation of domestic law" when it comes to the most important question in the case – *i.e.* whether the procedural errors where so significant that according to Icelandic law the court was left without competence to act as a tribunal at all or whether the participation of the judge in question would be irregular, that is illegal according to domestic law.

18. The Court also expresses this deviation in paragraph 100, where it has substituted the expression "a violation of the said domestic legal provisions on the establishment and competence of judicial organ by a tribunal" with the expression "a violation by a tribunal of domestic legal provisions *relating* to the establishment and competence of judicial organs". This includes *any* non-compliance of domestic rules relating to the establishment and competence of tribunals. The Court does also express this in paragraph 98, where it states that "the process of appointing judges ... must ... be conducted in compliance with the applicable rules of national law" without linking this to the competence of the tribunal. On this point the majority points to a judgment from the General Court of the European Union in case No. T-639/16 P of 23 January 2018, which does not, in the view of the Government, support this assertion. In that case the test is whether the flaws in the procedure were such as to affect the proper composition of the court (competence). The procedural flaws were undoubtedly grave as the judge in question was appointed without any public call for application. Thus, the Government agrees with the minority of the Chamber that the majority is extending the scope of the concept "establishment" to the process of appointing judges, and holding that in order to be in accordance with the principle of the rule of law, that process must "be conducted in compliance with the applicable rules of national law in force at the material time", *cf.* paragraph 5 of the joint dissenting opinion. Such a statement is too broad. As the minority points out, while certain illegalities affecting the appointment process may at the same time affect the "legality" of the establishment of the court in which a candidate later sits as a judge, they must be clearly circumscribed and in any event linked to the overall purpose of the requirement that the tribunal be "established by law", namely that of ensuring that the court has the "legitimacy" to decide cases.

19. In the light of this, the Government respectfully submits that this is a new test or an application of a test in a new context, it deviates from the established case-law and,

even if it were accepted, it is being used in a troubling way. Furthermore, the test as it is laid out in the judgment is too broad, vague and open-ended. Moreover, the Government disagrees with the majority of the Chamber that this new test is the most convincing interpretation of the requirement of "established by law" in the sense of Article 6 § 1 for cases like this. Therefore, the Government is of the opinion that there is a strong need for the Grand chamber to address this principled question of interpretation of the Convention.

The second serious question affecting the interpretation (and application) of the Convention

20. The Government is of the view that the majority of the Chamber disregards the principle of subsidiarity and, in effect, sets aside the assessment of the Icelandic Supreme Court on the relevant domestic law and substitutes it with its own assessment of the nature of the violations. The Government points out, firstly, that the Supreme Court did consider the nature and gravity of the violations in its judgment of 24 May 2018 in case no. 10/2018 when it reached its conclusion. The majority of the Chamber neglects the fact that the Icelandic Supreme Court has established that the flaws in the appointment procedure far from left the Court of Appeal without competence to act as a tribunal in the case. The majority of the Chamber ignores the legal effects of the violations according to domestic law and the Supreme Court's assessment of them. It asserts that the Minister violated the procedural rules, as was determined by the Supreme Court in its judgments of 19 December 2017, in cases no. 591/2017 and 592/2017, but it disregards in full the Supreme Court's judgment of 24 May 2018 on the consequences of that same violation.

21. Secondly, the majority of the Chamber criticises the Icelandic Supreme Court for not using the flagrant violation test, *cf.* paragraphs 109 and 120. However, the Government maintains that this is a new test and it was, therefore, impossible for the Supreme Court to apply it. The Government also notes that the "flagrant violation" test should be a test for the Court when deciding if the Court should override the Icelandic Supreme Court's interpretation of Icelandic national law, including the Constitution. Thirdly, the majority of Chamber seems to go far in interpreting domestic law. For

example, when it independently interprets the domestic law on the Parliamentary voting procedure, see paragraph 103 of the present judgment.

A serious question of the application of the Convention

22. Even if the "flagrant violation" test were accepted and used, the Government respectfully submits that it has been applied wrongly in the present case. In the opinion of the Government, the application of some of the facts to the test is either inadequate or erroneous. In the Government's view, the judgment of the majority of the Chamber does not give adequate weight to factors that diminish the perceived seriousness of the procedural irregularities in question or takes them out of context. The Government points to the strong language used by the minority in the joint dissenting opinion. There the judgment is, among other things, called an "overkill", *cf.* paragraph 1 of the joint dissenting opinion. The Government also invites the Panel to compare and contrast the description of the nature of the violation in the judgment of the majority and the joint dissent opinion. The Government also draws attention to the view expressed in the joint dissenting opinion that the application of the test was incorrect, *cf.* paragraph 7 of the joint dissenting opinion. To give a general example, there is no attention given to the explanations given by the Minister of Justice for her actions at each time or the context of the decisions. Instead the majority of the Chamber quotes phrases from Supreme Court judgments that are put forth in a different context and wholly disregards other parts of those very same judgments that diminish the significance of the irregularities. As a more concrete example, the majority of the Chamber sets asides the Supreme Court's assessment that the irregularity of the voting of Parliament was not significant and substitutes it with the assessment that it amounted to a serous defect. It does not mention or address counterweighing factors, such as the fact that the Members of Parliament were offered to vote separately on the candidates but did not object to this procedure or request a separate voting, a Parliamentary Committee had reviewed the case before it was voted on and there is nothing that points to the conclusion that a different voting arrangement would have had any effect on the voting result. If the Panel refers the case to the Grand Chamber, the Government intends to point to multiple examples of the same nature in more detail.

A Serious Issue of General Importance

23. The Government is of the view that the judgment in this case raises a serious issue of general importance and it could have a general and widespread impact in other contracting states. The conclusion of the majority of the Chamber raises a matter of dispute and is in many ways unclear, which is why it is essential to refer the case to the Grand Chamber for clarification. Three sub-issues will be mentioned.

24. Firstly, as is pointed out in the separate opinion of the minority, the question will undoubtedly arise whether and to what extent court decisions can be challenged on the basis of a flaw in the procedure for appointing a judge to sit on the bench, a flaw which may have occurred a long time before the case arrived before that judge. The Government agrees with this assumption and is of the opinion that the judgment raises an important issue at the European level. The Government draws the attention of the Panel to the wording used in the joint dissenting opinion, where it says that the "majority open a Pandora's box by offering to convicted persons an argument, indefinitely available, to challenge their conviction...", *cf.* paragraph 1 of the joint dissenting opinion.

25. Secondly, the consequences of the judgment can become grave throughout the legal system in Iceland. It is very urgent to interpret the judgment correctly from the beginning. When the judgment was published the operation of the Court of Appeal was suspended for a week. However, the Court of Appeal decided to commence its operation, but the four judges in question decided not to sit on the bench in any case since the judgment of the Court was published. The Court of Appeal is thus operating with only eleven out of the fifteen judges, which legally are required to sit in the Court of Appeal, *cf.* Article 21(1) of the Judiciary Act No. 50/2016. Judges in Iceland are tenured, *cf.* Article 61 of the Icelandic Constitution, and cannot be discharged from office against their will except by a judgment. That is only possible in very specific and extreme cases, such as when a judge has committed a criminal conduct. Such legal proceedings against these four judges are not possible. The Government is bound by the Constitution and the Convention regarding the independence of the judiciary and cannot on its own decide to take any measures against the judges in question in order for the court system to work in accordance with the judgement. The possibility of

violating the Convention or the Icelandic Constitution in any attempt to abide by the judgement could become very relevant. The Government reiterates that if this judgment will become final the consequences would be that the judges in question would still be lawfully appointed but their rulings would be considered a violation of the Convention. The judges are appointed and can participate in cases according to domestic law, as confirmed by the Supreme Court in its ruling from May 2018, but if they do so the Government has violated Article 6 according to the present judgment. This is also one of the consequences of separating the violations of the appointment procedures from their legal effect according to domestic law and assessing them independently (and only) in light of Article 6. It is worth stressing this point.

26. With regards to the consequences of the judgment the majority limits themselves, as stated in the separate opinion, to referring to the possibility of reopening the criminal proceedings against the applicant. The Government agrees with the minority and points out that the consequences could be greater than that and have already been. The Court of Appeal began its operation on 1 January 2018. The four judges in question have already rendered judgments in many cases. What will happen to these cases is unclear, but it is possible that they will be reopened with associated inconvenience. These judgments have already been executed – compensations have been paid, defendants have already been sentenced to prisons *etc.* The impacts could be even greater if the judgment should be interpreted in a way that would render the appointment of all fifteen judges questionable under the Convention.

27. The Government points out that not only does the judgment have effects on the Court of Appeal, but also the Supreme Court of Iceland. Many cases on the Supreme Court's agenda are cases, where at least one of these four judges in question sat on the bench. The legitimacy of these judgments has now been questioned.

28. Thirdly, the Government maintains that the judgment in this case is unclear on many issues and is subject to further interpretation. The Government has throughout the years endeavoured to comply with the provisions of the Convention and to comply with the Court's judgments. However, the conclusion of the majority of the Chamber makes that very difficult as further clarification is needed. The Government points to the following absolutely crucial issue. It is not clear whether statements in paragraphs 119-122 should

apply to all fifteen judges of the Court of Appeal or only the four judges in question. This part of the judgment, paragraphs 119-122, is in the view of the Government of Iceland unclear and subject to further interpretation and makes it very problematic to respond to the ruling. In this regard it should be noted that the principal legal specialists on the matter in the country do not agree on how to understand the judgement in this respect. It has been pointed out that the present judgment was about one of the four judges, but it is not clear what will happen if and when there is a challenge to the remaining eleven judges. Will the "serious defect" then be considered a "flagrant violation" in a different case? Therefore, it is paramount and cannot be stressed enough how vital it is to receive a clarification on whether the judgment of the Court concerns the whole court or only the four judges in question. The measures that might be taken differ widely depending on whether the appointment of the whole Court of Appeal is at stake or the four judges in question.

29. The Government is of the view that the requirement set out in Article 43 of the Convention and Rule 73 of the Rules of Court on the serious issue of general importance is fulfilled, as the consequences following the present judgment both for Iceland and for other States are considerable.

IV. Final Remarks

30. In line with the foregoing the Government is of the view that the present case is a candidate for the Grand Chamber. The Government maintains that the Grand Chamber Panel should accept its request for referral as the requirements provided for in Article 43 of the Convention and Rule 73 of the Rules of Court are fulfilled. This is an exceptional case, which raises serious questions affecting the interpretation and application of the Convention and serious issues of general importance both in Iceland and in other contracting States. It is very important that the Court is consistent in its judgments – and as the judgment in this case departs significantly from previous case-law of the Court the Grand Chamber needs to determine how the Court shall proceed in the coming years. Will the Court have a different approach when it comes to the principle of subsidiarity than it has held in the previous years and is this new development in the use of a "flagrant violation" test and on the issue "established by

law" a precedent for the Court and national courts to abide by in the future? The interpretation of the Grand Chamber is therefore essential.

31. The Government points out, in addition, that there is a forceful dissenting opinion of two judges in this case. The minority criticises the majority for being influenced by a political discussion in Iceland and thus deviate from the established principles of the Court's case-law. The minority notes that convicted persons can in the future challenge their conviction on the basis of grounds that have nothing to do with the fairness of the trial. This demonstrates that there is not a consensus within the Court on the matter. Thus, the Government states that it is important that the Grand Chamber will deal with the issues this judgment raises – *i.e.* this new application of the "established by law" and the flagrant violation test, along with the grave deviations from the principle of subsidiarity.

32. The Government has in this request highlighted the situation that has risen in the Icelandic judicial system following the judgment of the Court in the present case. The interests of the State are immense and the impact, if a violation is confirmed, could be severe for the Icelandic judicial system, *i.e.* whether it would apply to four judges or the Court of Appeal as a whole.

33. Lastly, the case concerns fundamental principles. The Government is aware that it is a core task for the Court to protect the "rule of law", not the least as several countries in Europe do experience changes and pressure against their legal and judicial systems that entails a risk of courts not being independent and established by law. However, the Government argues that in doing so it is also important that the Court maintains its legitimacy and a balanced approach. Thus, while there is an obvious need to avoid courts being established in an arbitrary manner, one should also be careful not to undermine the legitimacy of the national courts, the national judicial system and the national democratic system. Accordingly, there is a need to clarify the concept "established by law", in order to balance the protection of the independence of the national courts and the respect for the national judicial system and the principle of subsidiarity. The Government maintains that the Court must distinguish between cases where the independence and the legitimacy of national courts is at real risk, and cases as this, where there is no reason to deviate from the finding of the Icelandic Supreme

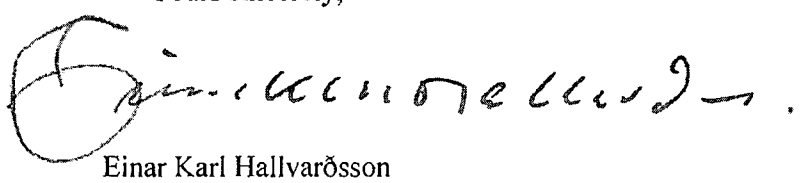
Court that the Court of Appeal was fully competent and independently established and in accordance with the Icelandic Constitution. If procedural errors are such that they do not give reason to suppose that the appointed judge will be without competence or not be truly independent in exercising his or her office, there is not a sufficient reason for the Court to intervene by disregarding domestic law. This is in line with the Icelandic Supreme Court pointing out that there is no such risk in this case.

34. The majority of the Chamber recalls in paragraph 103 that the notion of separation of powers between the executive and the judiciary has assumed growing importance in the Court's case-law and the same applies to the importance of safeguarding the independence of the judiciary. The Government is, as previously stated, aware of the present-day conditions in many European countries where the independence of the courts is a delicate political matter. That being said, it is very important to distinguish this case from typical problems which recently have been occurring in some other European states. It seems that what is really at stake in these countries is the independence of the courts, and not so much the "established by law" criteria in itself.

35. The Government believes that the conditions laid down in Article 43 of the Convention are fulfilled in the present case. Therefore, the Government respectfully asks the Court to accept its request for referral.

36. The Government draws the attention to the fact that the court procedure has so far been expedited, and given the potential impact it is desirable that the process of this request would as well be expedited.

Yours sincerely,



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