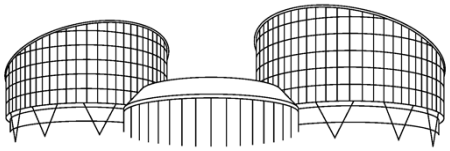

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GESTUR JÓNSSON AND RAGNAR HALLDÓR HALL v. ICELAND

(Applications nos. 68273/14 and 68271/14)

JUDGMENT

STRASBOURG

30 October 2018

THIS CASE WAS REFERRED TO THE GRAND CHAMBER WHICH DELIVERED JUDGMENT IN THE CASE ON 22/12/2020

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gestur Jónsson and Ragnar Halldór Hall v. Iceland,

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

Julia Laffranque, *President,*
Robert Spano,
Işıl Karakaş,
Paul Lemmens,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Ivana Jelić, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 2 October 2018,

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

PROCEDURE

1. The case originated in two applications (nos. 68273/14 and 68271/14) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Icelandic nationals, Mr Gestur Jónsson ("the first applicant") and Mr Ragnar Halldór Hall ("the second applicant"), on 16 October 2014.

2. The applicants were represented by Mr Geir Gestsson, a lawyer practising in Reykjavík. The Icelandic Government ("the Government") were represented by their Agent, Ms Ragnhildur Hjaltadóttir, Permanent Secretary of the Minister of the Interior.

3. The applicants alleged that the District Court judgment of 12 December 2013 and the Supreme Court judgment of 28 May 2014 had violated their rights under Articles 6 and 7 of the Convention and Article 2 of Protocol No. 7 to the Convention.

4. On 2 and 3 March 2016 respectively the applications were communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The first applicant was born in 1950 and lives in Reykjavík. The second applicant was born in 1948 and lives in Reykjavík. Both applicants are attorneys practising in Reykjavík.

6. On 16 February 2012 Y and Z were indicted for participating in fraud and market manipulation along with two other individuals. On 7 March 2012, in accordance with Article 31 of the Criminal Procedures Act No. 88/2008 (hereinafter "the CPA"), the first applicant was appointed as Y's defence counsel and the second applicant was appointed as Z's defence counsel.

7. On 7 March 2012, the indictment of the prosecution against, *inter alios*, Y and Z was registered before the District Court of Reykjavík. At a preliminary hearing they pleaded not guilty to the charges laid against them. From March to December 2012 the prosecutor and the applicants, along with the other defence counsel in the proceedings, repeatedly submitted arguments in further preliminary hearings about various issues, such as the evidence submitted by the prosecution, the deadline for the defence to file pleadings and the defence's request to dismiss the case. The Supreme Court issued three rulings on procedural matters in the case.

8. On 19 December 2012, after consulting the prosecution, the applicants and the other defence counsel, the District Court judge decided that the trial would take place from 11 to 23 April 2013. The same day, the second applicant replied to the judge's email stating that, although it was reasonable to decide dates for the trial, he wanted to remind the judge that the case was not ready for trial at that time because the prosecution had not submitted the requested evidence and issued a witness list. Shortly afterwards the judge replied with "Merry Christmas!".

9. On 24 January and 7 March 2013 the prosecution submitted further evidence in the case. During the second of these preliminary hearings, the applicants and the other defence counsel requested more time to study the evidence and the postponement of the trial, *inter alia*, because the submission of evidence had not been concluded. By a decision of the same day the District Court rejected the request.

10. In a preliminary hearing on 21 March 2013, the prosecution and one defence counsel submitted further evidence. The applicants and the other defence counsel requested that the prosecution provide them with certain documentary evidence. In a preliminary hearing on 25 March 2013 the applicants and the other defence counsel requested again that the trial be postponed for 6-8 weeks to allow them to study new evidence presented by the prosecution. By decisions of 26 March 2013, the District Court rejected both requests. By a decision of 4 April 2013, the Supreme Court dismissed the appeal.

11. On 8 April 2013 each applicant wrote a letter to the District Court judge in the case, arguing that they could not, for reasons of conscience, continue to perform their duties as defence counsel for their clients. The applicants stated, *inter alia*, that they had not been informed about the deadline to submit their pleadings to the Supreme Court before its ruling of 4 April 2013, the prosecution had neglected to send them a copy of its

pleadings, the defence had not had adequate access to important documents, the prosecution had tapped telephone conversations between them and their clients and the whole procedure had in general violated their applicants' rights under the Constitution, the CPA and the Convention. Lastly, the applicants stated that their clients' rights had been so grossly violated that they were forced to resign from further participation in the case. They noted that they had discussed this with their clients and made clear that the latter approved of their decision. The applicants requested that their appointment as defence counsel for their clients be revoked in accordance with Section 21 (6) of the Attorneys' Act No. 77/1998.

12. On the same day, the District Court judge replied to the applicants' letters and rejected their requests. The judge referred to the CPA and the Attorneys' Act. He reiterated that the trial would start on 11 April 2013 as previously decided. The applicants replied to the letter immediately, referred to their previous arguments and stated that they would not attend the trial on 11 April 2013.

13. On 11 April 2013, Y and Z attended the trial accompanied by new defence counsel. The applicants did not attend the hearing and were not summoned to appear by the court. The presiding judge recorded the aforementioned communications between him and the applicants and declared that it was unavoidable to relieve the applicants of their duties as defence counsel. New defence counsel were appointed for Y and Z and the trial was postponed for an unspecified period. The prosecution requested that the applicants be fined for contempt of court under Section 223 of the CPA (see paragraph 32 below).

14. 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.

15. A new trial was held before the District Court from 4 to 14 November 2013. In the meantime, the presiding judge had withdrawn from the case and a new judge had been appointed.

16. By a judgment of 12 December 2013, Y and Z, along with the other two accused, were convicted. Furthermore, the applicants were each fined 1,000,000 Icelandic *krónur* (ISK; approximately 6,200 euros (EUR) at the material time) under Section 223(1) (a) and (d) of the CPA for offending the court and causing unnecessary delay in the case by not attending the trial on 11 April 2013 and thereby damaging their clients' and the other defendants' interests. The judgment was delivered in the absence of the applicants.

17. On 13 December 2013 the applicants appealed to the Supreme Court against the District Court judgment as regards the imposition of fines, by way of an appeal lodged by the prosecutor at their request. Before the Supreme Court, the applicants primarily requested that the District Court judgment be annulled as to the imposition of their fines and, as a subsidiary request, that the fines be reduced, were the Supreme Court to reject their request for annulment.

18. In their submissions to the Supreme Court the applicants claimed firstly that they had been penalised without having been given the opportunity to defend themselves against the prosecution's claims or being made aware of the court's intention to impose fines on them. This had been a violation of their right to a fair trial under Article 6 §§ 1 to 3 of the Convention and Article 70 of the Constitution. Secondly, the applicants maintained that they had had valid reasons to resign from the case and that the legal conditions to fine them had not been fulfilled.

19. As regards their first claim, the applicants argued that they had at no point been informed that the court was considering imposing fines on them and they had not been invited to defend themselves before the District Court, which was a fundamental part of the right to a fair trial.

20. As regards the second complaint, the applicants argued, *inter alia,* that imposing fines on them as defence counsel had not been in accordance with the CPA as they had not been defence counsel at the time the District Court judgment was delivered. They argued that, according to Section 224 of the CPA, they should have been fined immediately as "others". Furthermore, the applicants maintained that their conduct in question had not occurred during the proceedings as the CPA required. In any event, their behaviour could not be considered as offending the court since they had not attended any hearings with the judges who had imposed the fines and decided on the merits of the case. The applicants further stated that their actions had been in their clients' interests, and their clients had approved of their decisions.

21. The applicants submitted documentary evidence along with their submissions to the Supreme Court. They did not ask to examine witnesses or to give statements themselves before the court.

22. The Supreme Court held an oral hearing in the case where the applicants were represented by legal counsel. No witnesses were heard and the applicants did not give statements before the court.

23. The applicants were represented by two separate defence counsel before the Supreme Court. However, the applicants claimed before this Court that, due to the limited time given to present the case before the Supreme Court, each defence counsel put forth arguments on behalf of both applicants.

24. According to the second applicant's summary of the oral pleadings before the Supreme Court the applicants argued, *inter alia*, that a decision to

impose court fines was an *ex proprio motu* decision of the court, without the parties' involvement, and could therefore not be quashed and referred back to the first instance court. Furthermore, the applicants argued that referring the case back to the District Court for a new trial due to a violation of the CPA and Article 6 of the Convention could never be legitimate at this point as the time-limits for imposing fines on them had expired. According to Section 223 and 224 of the CPA the applicants could only be fined as "defence counsel" in a substantive judgment in the criminal case against their clients or as "others", during the main trial in the criminal case against their clients. Additionally, the applicants argued that the amount of the fine was tenfold compared to fines imposed in previous cases and that no maximum amount for fines was stipulated in the CPA. Furthermore, the applicants referred to the principle of legality in criminal cases (Article 69 of the Constitution) and the principle of *lex certa*.

25. By a judgment of 28 May 2014, a majority of the Supreme Court (three out of five judges) confirmed the District Court judgment as regards the fines imposed on the applicants.

26. In its judgment the Supreme Court described the facts in detail. It referred to the obligation incumbent on attorneys under Article 20 of the Attorneys' Act to accept the appointment or nomination as defence counsel in criminal proceedings if they fulfilled statutory requirements. Furthermore, the Supreme Court held that the applicants could not resign as defence counsel in a criminal case with reference to Section 21 (6) of the Attorneys' Act as it only applied to civil cases. Their decision not to attend the trial in spite of the District Court rejecting their request to relieve them of their duties as defence counsel was not in accordance with the law or in the interest of their clients or the other defendants. Their statements about resigning from their positions as defence counsel had furthermore been a gross violation of their obligations as defence counsel under Section 34 (1) and 35 (1) of the CPA. The applicants had completely disregarded the legitimate decisions of the District Court judge, who had had no other option than to revoke their appointment as defence counsel and to appoint others to secure legal representation for the accused.

27. The Supreme Court subsequently set out in detail the applicable legal provisions on the imposition of court fines, namely Sections 222 to 224 of the CPA, and noted that the provisions did not stipulate any maximum fine. The court considered, moreover, that the fines imposed on the applicants were substantial and therefore categorised them as criminal punishment.

28. Furthermore, the judgment contained the following reasons:

> "As previously stated, the second sentence of Section 222 (1) of [the CPA] permits the prosecution to instigate proceedings for offences subject to fines pursuant to this chapter [Chapter XXXV]. According to general rules the defendants in question must then be provided with the opportunity to defend themselves. Such a case was not

instigated. On the other hand it was, as previously stated, also possible for the judge in the criminal case, of his own accord, to impose fines in accordance with the first sentence of [Section 222 (1)]. Under those circumstances a special claim on behalf of the prosecution was not required. There are no grounds to hold that [the applicants] should have enjoyed lesser protection under the law, depending on which of the above-mentioned options were chosen when assessing whether they should be subject to the imposition of fines, which amounted to penalties, cf. Article 70 of the Icelandic Constitution and Article 6 (1) and (3) of [the Convention], cf. Act No. 62/1994.

When it became clear that [the applicants] would not fulfil their duty of attending the trial and the court was considering imposing fines on them, they should have been summoned to a special hearing and given an opportunity to present their case and submit further arguments to that end, beyond what they had already clearly raised in their correspondence with the District Court. However, this was not done. Instead [the applicants] were relieved of their duties at the hearing on 11 April 2013 and a decision to impose fines on them was taken in the judgment delivered on 12 December 2013.

As stated in Chapter V of the judgment the prosecutor lodged an appeal regarding this part of the case. That was done at the request of [the applicants] who, according to law, had the right to have the fines imposed on them by the District Court reviewed by a higher court following an oral hearing. [The applicants'] right to defend themselves on appeal is therefore not subject to any limitations by law and they were provided with the opportunity to raise any views in the oral hearing of the case, and as appropriate by giving statements themselves and presenting witnesses, cf. Article 205 (3) of [the CPA], or by instigating special witness proceedings, cf. Article 141 (1) of the same Act. In the light of this, the applicants' rights have not been impaired due to the lack of an oral hearing by the District Court before the decision was taken to impose fines on them. Accordingly, the procedure which has taken place is in accordance with the law and does not violate their rights to a fair trial under Article 70 (1) of the Icelandic Constitution and Article 6 (1) and (3) of [the Convention], cf. Act No. 62/1994. For reference see the judgment of [the Court] in the case of Weber v. Switzerland from 22 May 1990 and the judgment in the case of T v. Austria from 14 November 2000. Accordingly, with reference to the reasoning of the appealed judgment, the decision on the fines imposed on [the applicants] must be upheld."

29. The minority shared the majority's opinion that the applicants' conduct in not attending the trial in the criminal case against their clients had not been in accordance with the law and had been a violation of their duty as defence counsel. The minority also agreed that their conduct had caused a delay in the proceedings and the imposed fines had constituted criminal punishment.

30. However, the minority held as follows:

"When it became clear that [the applicants] would not attend the hearing, a hearing should have been convened immediately, according to provisions of [Chapter XXXV of the CPA], and [the applicants] given notice of the charges and the opportunity to object to the decision to impose the fines. However, that was not done. Instead [the applicants] were relieved of their duties at the trial on 11 April 2013 and new defence counsel were appointed in their stead. However, the decision to impose fines on [the applicants] was made in the judgment of 12 December 2013, without notifying them, who were not defence counsel any more, of those intentions and without allowing

them to defend themselves, both as regards the decision to impose the fines and the amount.

In accordance with the aforementioned, the processing of the case before the District Court was flawed, but no legal provision allows this part of the criminal case to be referred back to the District Court to be heard again. Given these circumstances in the processing of the case, the appealed provision of the District Court's judgment on the court fines should be annulled."

II. RELEVANT DOMESTIC LAW

31. The relevant provisions of the Icelandic Constitution (*Stjórnarskrá lýðveldisins Íslands)* read as follows:

Article 69

"No one may be subjected to punishment unless found guilty of conduct that constituted a criminal offence according to the law at the time when it was committed, or is totally analogous to such conduct. The sanctions may not be more severe than the law permitted at the time of commission."

Article 70

"Everyone shall, for the determination of his rights and obligations or in the event of a criminal charge against him, be entitled, following a fair trial and within a reasonable time, to the resolution of an independent and impartial court of law. A hearing by a court of law shall take place in public, except if the judge decides otherwise as provided for by law in the interest of morals, public order, the security of the State or the interests of the parties.

Everyone charged with criminal conduct shall be presumed innocent until proven guilty."

32. The relevant provisions of the Criminal Procedures Act No. 88/2008 (*Lög um meðferð sakamála*) read as follows:

Section 31

"...

Moreover, defence counsel for the defendant must be appointed if there is a main hearing in the case pursuant to Chapter XXV, unless the defendant has chosen defence counsel pursuant to Article 32 and does not wish to have counsel appointed, or if the defendant wishes to represent him/herself, cf. Article 29.

The judge may appoint defence counsel for the defendant even if the defendant has not requested such, if the judge deems the defendant to be unable to safeguard his/her interests sufficiently during court proceedings.

..."

Section 34

"If a defendant requests that the appointment or designation of defence counsel be withdrawn and new defence counsel be appointed or designated, said request shall be granted unless there is a risk of the case being delayed as a consequence.

...”

Section 35

“The role of the defence counsel is to set forth any elements in the case that may be grounds for acquittal or to the advantage of the defendant, and to safeguard the interests of the defendant in all respects.

...”

Section 140

“When data is collected before an Icelandic court, pursuant to the instructions in this Chapter, the provisions of Chapter II and Chapters XVIII-XX shall apply as appropriate. A judge presiding over data collection shall decide and rule on matters concerning such collection.

If circumstances so warrant while data is being collected before another court, a party can request that more data be collected there than had originally been requested. The judge in question shall decide whether such a request is granted.”

Section 141

“The provision of Section 140 shall be applied, as appropriate, when evidence is gathered before the District Court in connection with court proceedings before the Supreme Court.

...”

Section 171

“...

It makes no difference when statements, objections and evidence are presented during the process of the case.”

Section 196

“With the limits arising from other provisions of this Act, appeal against a District Court judgment lies to the Supreme Court in order to obtain:

a. a re-examination of the determination of penalties;

b. a re-examination of conclusions based on the interpretation or application of rules of law;

c. a re-examination of conclusions based on the evaluation of the evidentiary value of documentation other than oral statements before the District Court;

d. quashing of the judgment and remittal of the case;

e. dismissal of the case by the District Court.

When a judgment is appealed against, a re-examination may also be sought of rulings and decisions made during court proceedings before the District Court.

If a District Court judgment is appealed against for any of the reasons listed in the first paragraph of this Section, revision of the court’s conclusions regarding a claim pursuant to Chapter XXVI may also be sought, provided that it has been materially resolved and the defendant or claimant has requested a re-examination. If a District

Court judgment is not appealed against pursuant to the above, the defendant and the claimant may both appeal against the court's adjudication on the merits of the claim pursuant to the rules on appeals of judgments in civil proceedings."

Section 204

"The Supreme Court can pronounce a judgment dismissing a case from the court due to flaws in its presentation to the court without a hearing having previously taken place. Similarly, the Supreme Court may quash a District Court's judgment if there are material flaws in the procedure before the District Court ...

..."

Section 205

"...

The Supreme Court can decide that oral presentation of evidence should be submitted as deemed necessary by the court if there is reason to believe, in the light of the circumstances, that said presentation of evidence could have an effect on the outcome of the case."

Section 208

"...

The Supreme Court cannot re-evaluate a District Court's conclusion on the evidentiary value of an oral testimony, unless the witnesses in question or the defendant have given oral statements before the Supreme Court.

..."

Section 222

"The judge, of his/her own accord, shall determine fines in accordance with the rules laid down in this Chapter. Such fines shall be paid to the National Treasury. However, special proceedings may be initiated for offences subject to fines pursuant to this Chapter.

If there is further punishment, pursuant to other laws, for offences subject to the provisions of this Chapter, claims to that effect can be made in a separate case, regardless of rulings on procedural fines."

Section 223

"The defendant, defence counsel or legal advisor may be fined for:

a. intentionally causing undue delay of the case;

b. violating a prohibition, cf. Section 11 (1) or (2);

c. making indecent written or oral remarks before the court concerning the judge or other parties;

d. otherwise violating the dignity of the court with their conduct during proceedings.

The defendant or other parties testifying before the court may be fined for offences listed in items (b), (c) and (d) above.

A fine may be imposed on parties other than those laid down in the first two paragraphs of this section for violating a prohibition under Article 11 (1) or (2), for disregarding a judge's order to maintain order during a court session, or for otherwise behaving in a distasteful or indecent manner.

If the judge deems that the provisions of the first three paragraphs of this Section have been violated but that the offence is a minor one, the judge may decide to admonish the violator instead of imposing a fine.

The Supreme Court may impose a fine on the prosecutor, defence counsel or both for making a groundless appeal. Furthermore, the prosecutor, defence counsel or legal advisor may be fined for gross negligence or other misconduct during proceedings before the District Court or preparation or proceedings before the Supreme Court. The provisions of the first four paragraphs of this Section shall apply to proceedings before the Supreme Court as applicable."

Section 224

"Fines for the prosecutor, defendant, defence counsel or legal advisor shall be determined when a judgment in a case is rendered. If the case is concluded in another manner, fines against those parties shall be determined in a ruling.

Fines imposed on other parties than those named in the first paragraph of this Section shall be determined in a ruling as soon as the offence occurs."

33. Section 21 (6) of the Attorneys' Act No. 77/1998 (*Lög um lögmenn)* reads:

"...

A lawyer can resign from an accepted task at any time, but has the duty of ensuring that this will not damage his client's interest."

THE LAW

I. JOINDER OF THE APPLICATIONS

34. Given the similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

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

35. The applicants complained that the District Court of Reykjavík had tried and sentenced them *in absentia.* In their opinion there had been a breach of Article 6 §§ 1 to 3 of the Convention. The applicants further maintained that the Supreme Court did not and could not have remedied the procedural violations before the District Court. The relevant provision reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

36. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

(a) The applicants

38. The applicants submitted that Article 6 of the Convention applied in the case. They stated that the Supreme Court had found that the fines imposed on them were criminal penalties for the purpose of Article 6 of the Convention. This was undisputed between the parties. In this respect the applicants referred to the case of *T. v. Austria* (no. 27783/95, ECHR 2000-XII) and *Weber v. Switzerland* (22 May 1990, Series A no. 177) and stated that, unlike in these cases, no maximum amount for fines had been stipulated in Icelandic law.

39. The applicants maintained that they were tried and punished *in absentia* before the District Court and that they had not enjoyed any rights under Article 6 of the Convention before being fined by the District Court's judgment of 12 December 2013. Nevertheless, the Supreme Court confirmed the judgment and concluded that it had been enough for the applicants to enjoy these rights before the Supreme Court.

40. The applicants argued that where court proceedings took place before two instances in a member State, it was obliged to provide the rights under Article 6 of the Convention at both instances.

41. The applicants argued that appeal proceedings could not remedy a total lack of first instance proceedings in a criminal case, regardless of the court's scope of review under domestic law. The applicants submitted that although, in principle, an appellate court could rectify a total lack of first instance proceedings, it could only rectify flaws at first instance by overturning the first instance court's conviction or by referring the case back to the first instance for a new procedure. In support of this argument, the applicants referred, *inter alia*, to the case of *De Cubber v. Belgium* (26 October 1984, §§ 32-33, Series A no. 86).

42. The applicants submitted that, according to Icelandic procedural and criminal law, proceedings before the Supreme Court had been more limited than proceedings before a District Court and that they had enjoyed fewer rights before the higher court. Consequently, the Supreme Court could not fully remedy the violations of their rights at first instance.

43. The applicants also maintained that Article 6 § 2 of the Convention had been violated as the case against the applicants had commenced with a conviction by a court of first instance but no indictment against them. They further argued that guilt could not be proved unless evidence was submitted before the District Court, nor could it be proved before the Supreme Court without them being given the opportunity to hear witnesses and make statements before the court.

44. As regards the violations of the rights stipulated in Article 6 § 1, taken in conjunction with Article 6 § 3 of the Convention, the applicants maintained that no indictment had been issued against them, which would have been a prerequisite for them to enjoy all the rights under Article 6 of the Convention. Furthermore, they had not been asked to attend the hearing when the judgment was pronounced or made aware of the judgment.

45. Moreover, the applicants argued that they had not been afforded time or facilities to prepare their defence and they had not been offered the opportunity to defend themselves in person or through legal assistance before the District Court. Furthermore, the Supreme Court had not been able to remedy this fault by simply offering them the assistance of counsel before the Supreme Court.

46. The applicants further claimed that they had not been invited to make statements or to examine witnesses before the Supreme Court. They

argued that it had been for the Supreme Court to invite them to give statements and examine witnesses. In this respect the applicants referred to the cases of *Sigurþór Arnarsson v. Iceland* (no. 44671/98, §§ 35-38, 15 July 2003), *Botten v. Norway* (19 February 1996, §§ 52-54, *Reports of Judgments and Decisions* 1996-I), and *Sadak and Others v. Turkey (no. 1)* (nos. 29900/96 and 3 others, § 67, ECHR 2001-VIII). The applicants disagreed with the Supreme Court's conclusion that they could or should have requested to do so themselves in accordance with Section 205 (3) of the CPA or by instigating witness proceedings before another district court in accordance with Section 141 (1) of the same Act. The applicants argued that, looking at the wording of the provisions, the Supreme Court's approach in their case had not been in accordance with domestic law and legal practice and this had not been an effective or practical right. Additionally it would have been contrary to Article 6 § 2 of the Convention to oblige them to instigate special witness proceedings to prove their innocence.

47. The applicants contested the Government's arguments that there had been no disagreement as to the facts. Although the factual dispute between the parties had been limited, the Government could not assume that the applicants did not need to testify or examine witnesses.

48. Furthermore, the applicants contested the Government's argument that because they had not asked to examine witnesses or to give statements themselves they had waived those rights, as experienced attorneys. They should not enjoy lesser rights because they were practising attorneys. The waiver of those rights had to be established in an unequivocal manner and be attended by minimum safeguards commensurate with their importance. The applicants had not waived any of their rights either explicitly or implicitly.

(b) The Government

49. The Government agreed with the applicants that the fines in question had constituted penalties and that the offences committed by the applicants should be considered "criminal" within the meaning of Article 6 of the Convention. This had also been acknowledged by the Supreme Court. The Government furthermore acknowledged that the applicants had been tried and convicted by the District Court *in absentia*.

50. However, the Government maintained that the Supreme Court's judgment of 28 May 2014, confirming the District Court judgment of 12 December 2013, had not violated the applicants' right to a fair trial under Article 6 of the Convention.

51. The Government noted that the Court had repeatedly found that the Contracting States enjoyed wide discretion as regards the choice of the means to ensure that their legal systems are in compliance with the requirements of Article 6 of the Convention. In the Government's view the

flaws in the District Court's procedure did not by themselves constitute a violation if these defects were remedied on appeal. The requirement of fairness in Article 6 of the Convention had been interpreted to mean that it covered the proceedings as a whole, and as a result flaws at one level might be put right at a later stage. Article 6 of the Convention did not require an appeal court to order a retrial at first instance if new evidence were submitted on appeal and the right to retrial was not, as such, included among the rights and freedoms guaranteed by the Convention. In this respect the Government referred to the Commission decision in the case of *Callaghan and others v. the United Kingdom* (no. 14739/89, Commission decision of 9 May 1989, Decisions and Reports 60, p. 296).

52. The Government argued that the Supreme Court had acknowledged that the District Court procedure had been flawed and not in accordance with the requirements of Article 6 of the Convention. However, the applicants' access to the appeal procedure before the Supreme Court had not in any way been limited on the grounds that they had been absent from the District Court's proceedings. They had been able to present their case before the Supreme Court in such a way that the procedure as a whole complied with Article 6 of the Convention. The process before the Supreme Court had sufficiently remedied the defects of the District Court proceedings.

53. In the Government's view the question before the Court was whether or not the Supreme Court had been capable of remedying the defects in the first instance proceedings. According to the CPA the Supreme Court's scope of review had been very wide. A defendant could appeal against a judgment in order to obtain a revision of the District Court's assessment of points of law and re-evaluation of evidence. The only limitation on the Supreme Court's review had been that it could not re-evaluate the evidentiary value of oral statements made before the District Court. The Supreme Court could, if needed, examine witnesses and evaluate the evidentiary value of their statements. The Supreme Court's scope of review had therefore not been a hindrance for the applicants to resort to all the same defences as they could have resorted to before the District Court.

54. The Government submitted that the case of *Sigurþór Arnarsson v. Iceland* (cited above) reflected that it does not constitute a categorical breach of Article 6 of the Convention if a procedure before an appeal court is somewhat more limited than the procedure at first instance and that this also applied in cases where the appeal court could review questions of fact.

55. The Government stated that the applicants never presented any arguments to the Supreme Court which were beyond its scope of review. It seemed that there had not been any disagreement about the facts between the parties. The communications between the applicants and the District Court, which constituted the alleged offence, had been conducted by letter and email and therefore the applicants had not been in a worse position to maintain their arguments before the Supreme Court than if they had been

given an opportunity to defend themselves before the District Court. Although the process before the Supreme Court was in general more limited than the procedure before the first instance, that in itself did not hinder or limit their defence abilities in the present case.

56. The Government maintained that the CPA offered sufficient remedies to which the Supreme Court could have resorted had there been any differences between the applicants and the prosecution on the facts of the case, and it would have been necessary to have witnesses questioned or allow the applicants to give statements themselves. The Government referred to Section 205 (3) and Section 141 (1) of the CPA in this respect. Both provisions had been relied upon by appellants before the Supreme Court. The use of Section 141 (1) had not been subject to the Supreme Court's authorisation, and although Section 205 (3) had only been relied upon once before the Supreme Court, the Government reiterated that the circumstances in the applicants' case had been highly unusual. Furthermore, the Government maintained that the court could also have quashed the District Court judgment and referred the case back to the first instance according to Section 208 (3) of the CPA. However, it had not been necessary because of the way the applicants' appeals were constructed and argued.

57. The Government rejected the applicants' claim that it was the Supreme Court's obligation to invite them to examine witnesses or make statements themselves before the court. They were both experienced attorneys who were assisted by defence counsel before the Supreme Court and therefore there was no need to guide them in this regard.

58. Lastly, the Government noted that in the speech before the Supreme Court the applicants had argued that the case could not be referred back to the District Court for new proceedings. This had shown that the applicants had not argued that it was necessary to refer the case back to a lower court.

2. The Court's assessment

59. As to the application of Article 6 of the Convention in the present case, the Court notes that the applicants were each fined approximately EUR 6,200 under Section 223(1) (a) and (d) of the CPA for offending the court and causing unnecessary delay in the case by not attending the trial and thereby damaging their clients' and the other defendants' interests. In assessing whether or not there was a "criminal charge", the Court uses three criteria, commonly known as the "Engel criteria". The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal

charge (see *Sergey Zolotukhin v Russia*, [GC], no. 14939/03, § 53, ECHR 2009). The Court has in a number of cases reached the conclusion that fines for contempt of a court in the context of processing of cases before domestic courts did not amount a "criminal charge" (see, for example, *Ravnsborg v. Sweden*, 23 March 1994, §§ 30-36, Series A no. 283-B; *Putz v Austria*, 22 February 1996, § 33, *Reports* 1996-I; *Schreiber and Boetsch v. France* (dec.), no. 58751/00, ECHR 2003-XII; *Toyaksi and Others v. Turkey* (dec.), no. 43569/08, 20 October 2010; *Zugic v. Croatia*, no. 3699/08, 31 May 2011, §§ 63-71). The fact that a fine imposed is significant does not in itself imply that an offence can be qualified as a "criminal offence" (see *Brown v. the United Kingdom* (dec.), no. 38644/97, 24 November 1998). However, in a case where a short prison sentence was imposed for contempt of court, the Court has reached the conclusion that the offence amounted to a "criminal offence" (see *Kyprianou v. Cyprus* [GC], no. 73797/01, § 64, ECHR 2005-XIII; *Zaicevs v. Latvia*, no. 65022/01, §§ 31-36, 31 July 2007). Likewise, in a case where a substantial fine was imposed and the applicant risked imprisonment in default without a guarantee of a hearing, the Court also concluded that the offence amounted to a "criminal offence" (see *T. v. Austria*, cited above, §§ 61-67). Turning to the present case, the Court notes that the Criminal Procedures Act sets out the rules on the imposition of fines and no maximum amount for court fines is stipulated in the Act. The Court also notes that the fines imposed were substantial. Furthermore, the Supreme Court concluded that the fine imposed on the applicants had amounted to a criminal penalty (see paragraph 27 above). This finding by the Supreme Court was not disputed between the parties, who agreed that the fines imposed amounted to a "criminal offence". Therefore, and in particular having regard to the first Engel criterion, the legal classification of the offence under national law, the Court sees no reason to disagree with the Supreme Court. Accordingly, the applicants' offence should be considered to have been based on a "criminal charge" within the meaning of the criminal limb of Article 6 § 1 of the Convention, which is therefore applicable in the present case.

60. The Court observes that the guarantees set out in paragraph 3 of Article 6 of the Convention are specific aspects of the right to a fair trial set forth in paragraph 1 of the same provision. In these circumstances the Court finds it unnecessary to examine the relevance of paragraph 3 for the examination of the applicants' complaint, since their allegations in any event amount to a claim before the Court that the proceedings were unfair (see *Shkalla v. Albania*, no. 26866/05, § 67, 10 May 2011). The Court considers that the same applies to the applicants' complaint based on Article 6 § 2 of the Convention (see paragraphs 43 and 46 above) as it, in substance, is also directed at the lack of fairness encompassed by their conviction *in absentia* by the District Court and the subsequent alleged

failure by the Supreme Court to remedy the procedural flaws at first instance. In the light of the foregoing the Court will confine its examination to whether the proceedings were, viewed as a whole, fair within the meaning of Article 6 § 1 of the Convention.

61. The general principles as regards proceedings *in absentia* are set out in *Sejdovic v. Italy* [GC], no. 56581/00, §§ 81-95, ECHR 2006-II.

62. The Court reiterates that, although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect to both law and facts, where it has not been established that he has waived his right to appear and to defend himself (see *Sejdovic*, cited above, § 82 and *Hokkeling v. the Netherlands*, no. 30749/12, § 58, 14 February 2017).

63. The Court further reiterates its long-standing case-law to the effect that it is a fundamental principle that it is for the national authorities, notably the courts, to interpret and apply domestic law. Therefore, it is not for the Court to deal with alleged errors of law and fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention, for instance where, in exceptional cases, such errors may be said to constitute "unfairness" incompatible with Article 6 of the Convention. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017).

64. In the present case it is not disputed by the parties that the applicants were tried *in absentia* before the District Court. The Court agrees and recalls that the trial commenced anew on 4 November 2013 after the appointment of new defence counsel by the trial judge, and by a judgment of 12 December 2013 the applicants were fined (see paragraph 16 above). It is undisputed, as also stated by the Supreme Court (see paragraph 28 above), that they were neither summoned to appear before the District Court nor made aware of the District Court's intention to impose fines on them on the basis of the CPA. Therefore, the Court will proceed with examining whether the appeal proceedings before the Supreme Court provided the applicants with a remedy in the form of a fresh factual and legal determination of the criminal charge against them in accordance with the general principle described above (see paragraphs 61-62 above). Before proceeding with its examination, the Court finally considers it necessary to observe that in the judgment in *De Cubber v Belgium* (cited above, § 33), relied on by the applicants (see paragraph 41 above), the Court 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, albeit subject to the requirements of the general principles in the Court's case-law described above (see paragraphs 61-63).

65. The Court observes at the outset that the applicants appealed against the judgment of the District Court to the Supreme Court and submitted documentary evidence on appeal. An oral hearing was held before the Supreme Court where the applicants had full legal representation. Furthermore, the court heard counsel for the defence and the public prosecutor during the trial. The Supreme Court reviewed the District Court's findings on the merits and confirmed the latter court's judgment by setting forth its own independent reasoning, but also relying on the reasoning of the District Court as to the legal basis of the imposition of the fines and their amount.

66. According to Section 196 of the CPA, the Supreme Court had full jurisdiction to examine not only questions of law but also questions of fact pertaining to criminal liability, sentencing and evaluation of the probative value of documentary evidence other than oral statements before the District Court.

67. In its judgment the Supreme Court stated clearly that the applicants had the right to have their fines reviewed by a higher court following an oral hearing. In fact, as the Government accept (see paragraph 52 above), the Supreme Court proceeded on the basis that the proceedings before the District Court had not been in conformity with the requirements of Article 6 of the Convention (and the corresponding provision of Article 70 of the Icelandic Constitution) (see paragraph 28 above). The Supreme Court further noted that the applicants' right to defend themselves was not subject to any limitations by law and they were provided with an opportunity to raise any views in the oral hearing of the case and, as appropriate by making statements themselves and presenting witnesses, referring in that regard to Section 205 (3) of the CPA, or by instigating special witness proceedings in accordance with Section 141 (1) of the CPA (see paragraph 28 above). However, it is undisputed by the applicants that they did not request to be heard or to have witnesses examined before the Supreme Court (see paragraphs 21-22 above).

68. The applicants maintained that it had been for the Supreme Court to invite them to give statements and to have witnesses examined and they referred to the Court's case-law in support of this argument (see paragraph 46 above). They disagreed with the Supreme Court's conclusion, set forth in its judgment, that they could have asked to give statements themselves or to examine witnesses in accordance with Section 205 (3) of

the CPA or by instigating witness proceedings before another district court according to Section 141 (1) of the same Act. The applicants argued that, looking at the wording of the provisions, the Supreme Court's approach in their case had not been in accordance with domestic law and legal practice and this had not been an effective or practical right.

69. The Court finds that the applicants' arguments in this respect cannot be upheld for the following reasons.

Firstly, 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. The Court points out that the applicants were fully represented by legal counsel in the proceedings before the Supreme Court.

70. Secondly, as to the applicants' argument that the Supreme Court's approach to interpreting and applying Sections 205 (3) and 141 (1) of the CPA was not in accordance with domestic law and legal practice, the Court reiterates that, as an international court, it is not in a position to call into question the Supreme Court's interpretation of domestic law unless it can be deemed arbitrary or manifestly unreasonable (see paragraph 63 above), a standard which sets a high threshold for the Court's review.

71. In this regard, the Court takes note of the arguments raised by the applicants, and confirmed by the Government, that in judicial practice before the Supreme Court, witnesses have only once been called before the court. However, in the light of the principles described above, the Court is not in a position to disregard the unequivocal statements in the judgment of the Supreme Court (see paragraph 28 above) that "[the applicants'] right to defend themselves on appeal [was] ... not subject to any limitations by law and they were provided with the opportunity to raise any views at the oral hearing of the case, and as appropriate by giving statements themselves and presenting witnesses", the Supreme Court referring in this regard to the provisions of the CPA.

72. Therefore, taking account of the reasoning of the Supreme Court, which is the highest court in the Icelandic judicial system interpreting domestic law, and viewing the wording of the provisions in question in the light of the particular facts of the present case (see paragraph 32 above), the Court finds that the Supreme Court's interpretation and application of the provisions of the CPA to the applicants' case cannot be considered arbitrary or manifestly unreasonable within the meaning of the Court's case-law (see paragraph 63 above).

73. On the basis of the foregoing, the Court concludes that the applicants were provided with sufficient opportunity to obtain before the Supreme Court a fresh factual and legal determination of the merits of the charges against them which allowed them to put forward their case in proceedings compliant with the fairness guarantees of Article 6 § 1 of the Convention in the present case.

74. There has accordingly been no violation of Article 6 § 1 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

75. The applicants complained under Article 7 of the Convention that they were held guilty of an offence which did not constitute a criminal offence under national law and that the severity of their punishment, fines of ISK 1,000,000 (approximately EUR 6,200 at the material time), had not been foreseeable.

Article 7 § 1 of the Convention provides as follows:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the ones applicable at the time the criminal offence was committed."

76. The Government contested the applicants' claim.

A. Exhaustion of domestic remedies

1. The Government

77. The Government maintained that nothing in the case file indicated that the applicants had invoked Article 7 as regards the complaint directed at the foreseeability of the severity of their punishment. This part should therefore be declared inadmissible for non-exhaustion of domestic remedies.

78. In this regard, the Government disputed the applicants' submissions that they had raised the argument in their oral submissions before the Supreme Court. The summary of the submissions did not reflect that the applicants had, in this regard, raised Article 69 of the Icelandic Constitution or the corresponding Article 7 of the Convention, explicitly or in substance, and the Supreme Court judgment had not reflected that argument at all.

2. The applicants

79. The applicants argued that there were no formal requirements under domestic law for a defendant to plead an argument before the domestic courts. In this respect they referred to Section 171 (2) of the CPA which stated that an argument is admissible at any time during criminal proceedings and in both written and verbal form. Therefore, their oral

submissions should be taken into account for the purpose of the rule of exhaustion of domestic remedies.

80. Furthermore, the applicants claimed that according to the summary of their oral submissions it was clear that they had argued that the fine of 1,000,000 ISK had violated Article 69 of the Icelandic Constitution, as the maximum amount of the fine was not prescribed by law and that the amount of the fine was inconsistent with the Supreme Court's previous jurisprudence. It had therefore been argued in substance and they had given the Supreme Court the opportunity to examine whether the amount of the fine had been arbitrary and in breach of Article 7 of the Convention.

3. The Court's assessment

81. In the light of the documentation provided by the applicants, the Court accepts that it can be deduced from their oral submissions before the Supreme Court that they invoked the principle of legality in criminal cases (Article 69 of the Constitution), and argued that the amount of the fine was exceptionally high and that no maximum amount for court fines was stipulated in the domestic law. Therefore, it has to be considered that this particular argument, which has a basis in Article 7 of the Convention, was indeed pleaded by the applicants before the Supreme Court, at least in substance, in compliance with the formal requirements and time-limits laid down in the domestic law, and that the court was given the opportunity to address the allegation of a violation made by the applicants and to afford redress if appropriate.

82. Therefore, the Court concludes that the Government's objection must be dismissed. It finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further concludes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

83. The applicants argued that they should not have been fined as defence counsel for their action during court proceedings under Section 223 (1) (a) and (d) of the CPA as they had neither been defence counsel at the time the fines were imposed on them nor had their conduct taken place during court proceedings.

84. Furthermore, they argued that the amount of ISK 1,000,000 (approximately EUR 6,200 at the material time) of their fines had not been foreseeable according to the domestic law or jurisprudence as no maximum

amount for fines was stipulated in the domestic law and the highest fine according to the Supreme Court's previous jurisprudence had been 100,000 ISK.

(b) The Government

85. The Government argued that the applicants had been fined for resigning from their duties as defence counsel and for not attending the previously planned trial of their clients. The Government maintained that at the time the applicants failed to attend the trial, they had been appointed defence counsel for their clients and their decision not to attend the trial had been an action committed during the trial itself. Therefore, the conditions of Section 223 (1) of the CPA had been fulfilled.

86. The Government further submitted that the Supreme Court's application of Section 223 (1) of the CPA had been in compliance with Icelandic criminal law. The Government pointed out that the Court had undertaken its supervisory function with caution when establishing that the application of national law by national courts had been in breach of Article 7 of Convention and that in the present case there were no special reasons for the Court to substitute the domestic courts' interpretation and application of the national law in question with its own.

2. The Court's assessment

(a) General principles

87. The guarantee enshrined in Article 7, which is an essential element of the rule of law, should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see, *inter alia, Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013).

88. Accordingly, Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage; it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. It follows from these principles that an offence must be clearly defined in the law, be it national or international. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable (see *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 154, ECHR 2015, with further references).

89. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial

interpretation. There will always be a need for elucidation of doubtful points and for adapting to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial interpretation is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *Vasiliauskas v. Lithuania*, cited above, § 155).

90. Lastly, the Court held in *Kononov v. Latvia (*[GC], no. 36376/04, § 198, ECHR 2010), that "the Court's powers of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicants' conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention, even if there were differences between the legal approach and reasoning of this Court and the relevant domestic decisions. To accord a lesser power to this Court would render Article 7 devoid of purpose".

(b) Application of those principles to the present case

91. It does not appear that the Supreme Court directly addressed in its judgment of 28 May 2014 the arguments made by the applicants during their oral pleadings. However, it is clear from the judgment, and its reliance on the reasoning provided by the District Court as to the legal basis of the court fines, that the Supreme Court considered that Section 223 (1) (a) and (d) of the CPA clearly applied to the applicants' case in the light of the facts, and because the appropriate procedures had been applied as to who decided and when to impose the fines on them in accordance with the applicable provisions. As regards the amount of the fines, the court acknowledged that the law did not stipulate a maximum amount for court fines and that the fines imposed on the applicants had been high, and therefore concluded that the fines had been penalties in the light of Article 6 of the Convention (see paragraph 27 above).

92. The Court considers it important to take into account when dealing with the present case that the case seems, from the observations of the parties and the accompanying documentation, to have been 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. In this regard the Court recalls its case-law to the effect that where the domestic courts are called upon to interpret a provision of criminal law to a particular set of facts for the first time, an interpretation of the scope of the

offence which is consistent with the essence of the offence must, as a rule, be considered foreseeable (*Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-III).

93. As regards the applicants' argument concerning the interpretation of Section 223 of the CPA, the Court considers it sufficient to note that it does indeed provide a basis for imposing fines on "defence counsel" for particular acts. Although it would be the normal sequence of events that a defence counsel would be performing his or her function at the point in time when the fine would be imposed, the wording of the provision does not exclude the imposition of a fine on a defence counsel who has been replaced, resigned or been relieved of his or her duties. Hence, the Court does not consider that the interpretation given to the provision by the national courts contravened the very essence of the offence in question. Therefore, and taking account of the wording of the provision in question (Section 223 (1) (a) and (b) of the CPA), the Court does not find there to be adequate grounds to call into question the Supreme Court's finding that the provisions in question constituted an adequate legal basis for the imposition of the fines. It follows that the Court does not accept the applicants' claim that the provisions, as applied by the Supreme Court to the particular facts of the case which were elaborated in detail in the judgment of the court, lacked foreseeability within the meaning of Article 7 of the Convention. In this light, the lack of an explicit answer in the Supreme Court's judgment to the applicants' arguments based on the principle of legality in criminal cases does not suffice for the Court to come to a different conclusion.

94. As to the applicants' second argument concerning the lack of a specific stipulation of the maximum amount of fines under domestic law, the Court notes at the outset that Section 223 of the CPA clearly provided, as such, for the imposition of fines on defence counsel for the acts described in the provision. Moreover, the Court recalls its consistent case-law to the effect that Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see paragraph 89 above). It follows that the mere fact that a provision of domestic law does not stipulate the maximum amount which may be imposed in the form of a fine does not, as such, run counter to the requirements of Article 7 of the Convention. Moreover, although it is undisputed that the fines imposed on the applicants were substantially higher than previously imposed fines under Section 223, the Court recalls that it is also clear from the observations of the parties, as described above, that the present case was the first of its kind and one in which the Supreme Court considered that the nature and gravity of the applicants' actions warranted the imposition of fines which were higher than imposed in other prior cases with different facts. Therefore, the Court finds that, in the light

of the conclusions of the Supreme Court, the amount of the fines in question was consistent with the essence of the offence and could have been reasonably foreseen by the applicants.

95. Consequently, the Court concludes that there has been no violation of Article 7 of the Convention in the present case.

IV. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL NO. 7 TO THE CONVENTION

96. The applicants complained that their right to appeal had been violated as their defence had only been heard before one tribunal, the Supreme Court.

Article 2 of Protocol No. 7 to the Convention provides, in so far as relevant, the following:

> "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law."

97. The Government contested that argument.

A. Admissibility

1. The parties' submissions

(a) The Government

98. The Government maintained that the applicants had not exhausted available domestic remedies as regards this part of their application. The Government argued that in their submissions to the Supreme Court the applicants had not requested that the District Court judgment be quashed and the case be referred back for a new trial. Furthermore, they had not claimed that it was necessary to have a new trial before the District Court, even though they had maintained that the procedure before the first instance court had been flawed and in violation of Article 6 of the Convention and Article 70 of the Constitution. Moreover, nowhere in their submissions to the Supreme Court had they argued that the court could not remedy the defects in the lower court's proceedings.

99. The Government pointed out, as regards the applicants' reference to the Supreme Court's minority opinion, that it did not have any legal value and that the legal basis for the minority's conclusion had been unclear.

(b) The applicants

100. The applicants contested the Government's claim. They argued that, according to the wording of Article 204 (1) of the Act and the clear and consistent jurisprudence of the Supreme Court, the court quashed first

instance judgments and ordered first instance retrials of its own motion. Therefore, it had not been a condition under the provision that a motion for a retrial would be submitted by the parties. The applicants further claimed that the minority had explicitly dealt with the issue whether to quash the first instance judgment and order a retrial without such motion.

101. The applicants also maintained that it had not been an obligation to exhaust remedies by making claims which would have been manifestly ill-founded. Referring to the Supreme Court minority's opinion the applicants argued that a claim for a retrial would have been ill-founded as there had not been any legal provision to allow remand of this aspect of the District Court's judgment back to the first instance for a new process. They further argued that a retrial at this point would also been meaningless as the deadlines to impose fines on them at first instance under Sections 223 and 224 of the Act had expired.

2. The Court's assessment

102. It is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with the supervision of the implementation by the Contracting States of their obligations under the Convention. It should not take on the role of the Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see, among other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-70, 25 March 2014).

103. While in the context of machinery for the protection of human rights the rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of remedies designed to challenge impugned decisions which allegedly violate a Convention right. It normally requires also that the complaints intended to be made subsequently at the international level should have been aired before those same courts, at least in substance, and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III, and *Nicklinson and Lamb v. the United Kingdom* (dec.), nos. 2478/15 and 1787/15, § 89, 23 June 2015).

104. The object of the rule on exhaustion of domestic remedies is to allow the national authorities (primarily the judicial authorities) to address the allegation made of a violation of a Convention right and, where appropriate, to afford redress before that allegation is submitted to the Court. In so far as there exists, at national level, a remedy enabling the national courts to address, at least in substance, the argument of a violation of the Convention right, it is that remedy which should be used. If the complaint presented before the Court has not been put, either explicitly or in substance, to the national courts when it could have been raised in the exercise of a remedy available to the applicant, the national legal order has been denied the opportunity to address the Convention issue which the rule on exhaustion of domestic remedies is intended to give it. It is not sufficient that the applicant may have exercised, unsuccessfully, another remedy which could have overturned the impugned measure on other grounds not connected with the complaint of violation of a Convention right. It is the Convention complaint which must have been aired at national level for there to have been exhaustion of "effective remedies". It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument (see among others, *Azinas*, cited above, § 38, and *Nicklinson and Lamb*, cited above, § 90).

105. Before the Court the applicants submitted that their right to appeal in criminal cases under Article 2 of Protocol No. 7 to the Convention had been violated as their defence was only heard before one court instance, the Supreme Court.

106. Before the Supreme Court the applicants primarily submitted that the District Court's judgment should be annulled as to the imposition of the court fines, and secondly that the amount of the fines should be reduced in the event of the Supreme Court rejecting their primary claim for annulment. Furthermore, according to the applicants' oral pleadings before the Supreme Court, they argued that the decision to impose fines according to domestic law was an *ex proprio motu* decision by the trial court deciding the case, without the case parties' involvement, which could not be quashed and referred back for a retrial (see paragraph 24 above). They further submitted that, according to the domestic provisions on the imposition of court fines and under Article 6 of the Convention, a retrial could not be legitimate (see paragraph 24 above).

107. It is clear, in the Court's view, that the applicants did not rely explicitly on Article 2 of Protocol No. 7 to the Convention in their written submissions before the Supreme Court or in their oral pleadings. As is directly stated in the Supreme Court's judgment, their claims on appeal were, as relevant here, limited to seeking primarily the annulment of the

District Court's imposition of the court fines and, on a subsidiary basis, the reduction of the amount of the fines, were the Supreme Court to reject their primary claim. In other words, irrespective of whether the CPA provided the possibility for the Supreme Court to quash the District Court judgment as to the imposition of the court fines and order a retrial on that issue, the applicants did not claim on appeal that such a right derived independently from the Convention right to appeal in criminal cases. Therefore, as the case has been presented to the Court, it cannot be deduced from the judgment of the Supreme Court, or the accompanying documentation, that the applicants formulated their claims and grounds on appeal to the Supreme Court in such a way that they could be considered to have sufficiently invoked, in substance, their rights under Article 2 of Protocol No. 7 to the Convention, which they raise now before the Court.

108. In these circumstances, the Court concludes that the applicants did not provide the Supreme Court with the opportunity, which is in principle intended to be afforded to a Contracting State by Article 35 of the Convention, of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it (see, *Unseen ehf v. Iceland* (dec.), no. 55630/15, § 19, 20 March 2018).

109. Consequently, this complaint must be rejected for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 *in fine* of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the complaints concerning Articles 6 and 7 admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been no violation of Article 6 of the Convention;

4. *Holds* that there has been no violation of Article 7 of the Convention;

Done in English, and notified in writing on 30 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Julia Laffranque
President