



THIRD SECTION

CASE OF BRAGI GUÐMUNDUR KRISTJÁNSSON v. ICELAND

(Application no. 12951/18)

JUDGMENT

Art 4 P7 • Right not to be tried or punished twice • Duplication of proceedings leading to imposition of tax surcharges and conviction of major tax offences, insufficiently connected in substance and time • Considerable overlap between investigations

STRASBOURG

31 August 2021

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 Bragi Guðmundur Kristjánsson v. Iceland,

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

Paul Lemmens, *President*,

Georgios A. Serghides,

Robert Spano,

Dmitry Dedov,

Darian Pavli,

Peeter Roosma,

Andreas Zünd, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 12951/18) 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 an Icelandic national, Mr Bragi Guðmundur Kristjánsson (“the applicant”), on 12 March 2018;

the decision to give notice to the Icelandic Government (“the Government”) of the complaint concerning the dual proceedings against the applicant and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 29 June 2021,

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

INTRODUCTION

1. The present case concerns proceedings against the applicant for tax code violations. Pursuant to administrative proceedings, the applicant’s taxes were re-assessed and a 25% surcharge was imposed. Subsequently, pursuant to criminal proceedings, the applicant was convicted of aggravated tax offences and sentenced to three months’ imprisonment and a fine of approximately 84,000 euros (EUR). The applicant complains that he was tried twice for the same offence, in violation of the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7 to the Convention.

THE FACTS

2. The applicant was born in 1944 and lives in Reykjavik. The applicant was represented by Mr Ragnar Halldór Hall, a lawyer practising in Reykjavik.

3. The Government were represented by their Agent, Mr Einar Karl Hallvarðsson, State Attorney General.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. TAX PROCEEDINGS

5. On 3 May 2011 the Directorate of Tax Investigations (*Skattrannsóknarstjóri ríkisins*) initiated an audit of the applicant's tax returns for the tax years 2007 and 2008. The audit was aimed at examining whether the applicant had failed to report his financial income, including income arising from forward contracts concluded with a bank. The applicant was questioned by the Directorate of Tax Investigations on 30 June and 30 November 2011. On 10 October 2011, the accountant who had prepared the applicant's tax returns was questioned.

6. By a letter of 13 December 2011, the Directorate of Tax Investigations sent the applicant the report of the audit, dated 9 December 2011, and invited him to submit his comments. By a letter of 23 December 2011, the applicant raised certain objections. The Directorate of Tax Investigations thereafter prepared an amended report, dated 30 December 2011. The conclusion of that report was that the applicant had filed substantially incorrect tax returns for the tax years 2007 and 2008.

7. By a letter of 30 December 2011, the Directorate of Tax Investigations forwarded the applicant's case to the Directorate of Internal Revenue (*Ríkisskattstjóri*) for the possible reassessment of his taxes. The applicant was informed of this on the same day by letter, wherein he was also informed that the Directorate of Tax Investigations would shortly reach a decision on whether to initiate criminal proceedings, listing the possible avenues that such criminal proceedings might take and giving the applicant thirty days to comment thereon.

8. By a letter of 27 January 2012, the applicant objected to any criminal proceedings, stating that the audit had revealed that the conditions for guilt were not satisfied and that there had been no intention to file incorrect tax returns. Should the case not be discontinued, the applicant requested that the case be concluded with the imposition of a fine.

9. By a letter of 5 November 2012 the Directorate of Internal Revenue stated its intention to re-assess the applicant's taxes for the tax years 2007 and 2008 and to impose a 25% surcharge on the unreported tax base. The Directorate of Tax Investigation's report was attached to the letter.

10. By a letter of 22 November 2012, the applicant objected to the planned re-assessment. He also demanded that a 25% surcharge not be imposed, since he had had no intention of filing substantially incorrect tax returns. His letter furthermore submitted that the applicant had himself, by a letter to the Directorate of Internal Revenue dated 25 July 2011, requested a correction to the taxes that he had paid for the 2007 and 2008 tax years.

11. By a decision of 30 November 2012, the Directorate of Internal Revenue re-assessed the applicant's taxes for the tax years 2007 and 2008, revising upwards the income declared by, respectively, 43,843,930 and 48,542,671 Icelandic *krónur* (ISK – approximately EUR 266,000 and

EUR 294,500, respectively, at the material time). In addition, the Directorate of Internal Revenue imposed a 25% surcharge, noting that taxpayers could not absolve themselves of their responsibility to file correct tax returns by entrusting others with the task of preparing and filing them.

12. The applicant lodged an appeal against this decision with the State Internal Revenue Board (“the Internal Revenue Board”) on 28 February 2013. By a ruling of 12 March 2014, the Board rejected the applicant’s primary demand for the annulment of the Directorate’s decision. However, the Internal Revenue Board deemed that the Directorate of Internal Revenue had neglected to take certain deductibles into account and reduced the upwards revision of the applicant’s income accordingly. The Board furthermore dismissed the applicant’s secondary claim to annul the imposition of a surcharge, as it found that neither section 108(3) of the Income Tax Act nor any other considerations justified dropping the surcharge (see paragraph 34 below).

13. The applicant did not seek judicial review of the Internal Revenue Board’s ruling, which thus acquired legal force six months later, on 12 September 2014, when the time-limit for bringing judicial appeal proceedings expired.

II. CRIMINAL PROCEEDINGS

14. In the meantime, by a letter of 12 November 2012 the Directorate of Tax Investigations referred the applicant’s case to the Office of the Special Prosecutor for investigation, forwarding its audit report concerning the applicant. On the same day the applicant was informed by letter that his case had been referred to the Office of the Special Prosecutor.

15. On 11 April 2013, the applicant was interviewed by the Office of the Special Prosecutor (“the prosecutor”). The applicant was informed that the investigation concerned the offences that he was alleged by the Directorate of Tax Investigations to have committed. On 14 August 2013, the applicant was again interviewed by the prosecutor.

16. On 21 May 2014 the prosecutor indicted the applicant for major tax offences. The applicant was indicted for having filed substantially incorrect tax returns for the tax years 2007 and 2008, failing to declare profits from the sale of shares and from forward swap contracts totalling undeclared income of ISK 87,007,094 (approximately EUR 527,900 at the material time). The case was registered with the Reykjavik District Court on 10 June 2014, at a hearing that the applicant did not attend. The case was next heard on 11 September 2014, when the applicant attended and pleaded not guilty.

17. At that hearing, the District Court decided at the applicant’s request to postpone hearing the case against him, pending “a judgment of the European Court of Human Rights concerning double jeopardy”. The case

was subsequently repeatedly postponed, with the comment that “the European Court of Human Rights’ judgment on double jeopardy is still not available”. The case was eventually heard on 25 February 2016, at which time the following was entered in the record of the court hearing:

“This case has, at the request of the applicant, been repeatedly stayed pending a judgment from the European Court of Human Rights on double jeopardy. That judgment is still not available. The judge deemed it impossible to stay the case any longer, and the main hearing in the case was therefore scheduled for today.”

18. By a judgment of 15 March 2016, the District Court convicted the applicant as charged. Regarding the issue of the alleged duplication of proceedings (“double jeopardy”), the District Court’s judgment noted that the Supreme Court of Iceland had not deemed that the imposition of a tax surcharge and the subsequent pursuit of criminal proceedings for tax violations had violated the principle of *ne bis in idem*. The case could therefore not be dismissed owing to the previous imposition of a tax surcharge.

19. The District Court sentenced the applicant to three months’ imprisonment, suspended for two years, and the payment of a fine of 13,800,000 ISK (approximately 83,700 EUR at the material time). In fixing the fine the District Court took into account the tax surcharges that had already been imposed on the applicant, albeit without providing any details regarding the calculations in this respect. The fine was to be paid within four weeks of the publication of the judgment, failing which it would be converted to seven months’ imprisonment. As the applicant’s defence counsel had not demanded the reimbursement of legal fees in the event of the applicant’s conviction, the applicant was not ordered to bear any legal costs.

20. The applicant lodged an appeal against that judgment (by way of an appeal lodged by the Director of Public Prosecutions at his request) with the Supreme Court on 11 April 2016. He argued, *inter alia*, that the case against him should be dismissed on account of the fact that the dual proceedings violated the *ne bis in idem* principle.

21. The case was scheduled to be heard by the Supreme Court on 6 February 2017, but the Supreme Court decided on its own initiative to postpone the hearing of the case until 4 September 2017, pending the delivery of the Court’s judgment in the case of *Jón Ásgeir Jóhannesson and Others v. Iceland*, no. 22007/11, 18 May 2017.

22. By a judgment of 21 September 2017, the Supreme Court upheld the applicant’s conviction and sentence. The judgment firstly found that the two sets of proceedings against the applicant – the tax proceedings on the one hand and the criminal proceedings on the other hand – had constituted dual criminal proceedings concerning the same facts, within the meaning of Article 4 of Protocol No. 7 to the Convention. It noted that the European Court of Human Rights did not consider that such dual proceedings

constituted a violation of the provision in question *per se*, but that such proceedings had to fulfil the requirement that they be sufficiently connected, both in time and in substance, in order to avoid duplication. In that regard, the judgment referred, *inter alia*, to the Court's judgments in the cases of *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, ECHR 2009, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016, and *Jón Ásgeir Jóhannesson and Others* (cited above). The latter judgment was summarised in detail, including the domestic proceedings preceding the case before the Court.

23. The judgment continued with an analysis of the applicant's case, which took into account the necessity of a connection in both time and substance, as established by the Court's case-law. In this respect, the judgment contains, *inter alia*, the following reasoning:

“According to the case-law of the [European Court of Human Rights], two separate proceedings against the same party or concerning the same or similar events must satisfy the criterion that the proceedings be complementary or supplementary. An audit by tax authorities and the imposition of sanctions for violations of tax law [are] subject to other legal rules than [is] a police investigation, which can subsequently form the basis for indictment and conviction by a court. An audit by tax authorities furthermore has different objectives than does a police investigation, as it is aimed in cases such as this primarily at revealing whether suspicions that income has been unreported in a tax return are justified. If this proves to be the case, the taxpayer's taxes are re-assessed and he is subjected to a surcharge, regardless of the taxpayer's subjective intention [*hugræn afstaða*].

This does not apply in the case of a police investigation into violations of tax law. Under section 109(1) of Act no. 90/2003, a person liable to pay tax who has deliberately or through gross negligence reported wrongly or misleadingly aspects of significance for his income tax [liability] shall pay a fine amounting to up to ten times the tax payable on the taxable income that was [undeclared] and no lower than the equivalent of double the amount of tax payable [on the undeclared income]. Major violations of the provision are punishable under Article 262(1) of the General Penal Code. In the same manner, intent or gross negligence in committing major violations of tax law is a condition for the imposition, under Article 262(1) of the General Penal Code, of a prison sentence, in addition to which that provision authorises the imposition of a fine, under applicable provisions of tax law, alongside the imposition of a prison sentence.

It follows from the above that proceedings pursued by the tax authorities are aimed at revealing other factors than those investigated by the police and adjudicated by the courts in connection with the same violation of tax law. Furthermore, the applicable penalties and conditions for their imposition differ. [It] must [therefore] be concluded that the legal arrangements for proceedings in respect of a criminal case that can lead to the conviction of a taxpayer are, according to the criteria of the [European Court of Human Rights], in their substance complementary or supplementary to the handling of that case by the tax authorities.”

24. The judgment went on to find that the investigation by the prosecutor had been aimed primarily at establishing aspects of significance for the purposes of determining whether the applicant's alleged offences had

been major, whether they had been carried out with intent or gross negligence, and whether persons other than the applicant had been involved. The Supreme Court found that the gathering and assessment of evidence had overlapped in the two sets of proceedings “to the extent that this [had been] unavoidable and [could] be considered normal”. Furthermore, additional documentation had been gathered during the course of the criminal investigation as was “necessary owing to the different penalties and different requirements for their application”. In the light of this, the Supreme Court deemed that the prosecutor’s investigation had not constituted an unnecessary duplication of the administrative proceedings, but that they had formed one integrated whole. Furthermore, the Supreme Court found that the applicant had enjoyed all appropriate procedural guarantees and that the District Court’s judgment had evidently taken into account the surcharge previously imposed when fixing the applicant’s fine, in accordance with section 109(1) of the Income Tax Act. Having regard to all of those elements, the Supreme Court found that the dual proceedings against the applicant had complied with the requirement that there be a connection in substance and had formed one integrated whole. Therefore, the question of whether or not the tax authorities’ decision in the case had constituted a “final decision” within the meaning of the case-law of the European Court of Human Rights was not decisive in respect of whether the dual proceedings were compliant with the Convention.

25. Turning to the issue of a sufficient connection in time, the Supreme Court noted that the length of both sets of proceedings against the applicant had totalled six years and four months, counted from the initiation of the Directorate of Tax Investigations’ audit of the applicant’s tax returns until the hearing before the Supreme Court. By contrast, the Supreme Court noted that the total length of the proceedings regarding *A and B v. Norway* (cited above) had amounted to approximately five years, and the total length of the proceedings regarding in *Jón Ásgeir Jóhannesson and Others* (cited above) had amounted to nine years and three months.

26. The Supreme Court observed that of the total length of both sets of proceedings, the criminal proceedings had been stayed at the applicant’s own request for a period of one year and five months, pending the judgment of the European Court of Human Rights (see paragraph 17 above). Furthermore, the Supreme Court hearing in the case had been stayed for the same reason, on the Supreme Court’s own initiative, for a period of seven months.

27. The Supreme Court then noted that the length of the tax proceedings, from the initiation of the audit to the pronouncement of the Internal Revenue Board’s ruling, had amounted to two years and ten months, compared to over three years in respect of *A and B v. Norway* (cited above) and three years and nine months in respect of *Jón Ásgeir Jóhannesson and Others* (cited above). The criminal proceedings in respect of the present

case had continued for a further three years and six months, counted from the pronouncement of the Internal Revenue Board's ruling until the hearing before the Supreme Court, compared to one year and ten months in respect of *A and B v. Norway* (cited above) and five years and five months in respect of *Jón Ásgeir Jóhannesson and Others* (cited above).

28. Furthermore, the Supreme Court remarked that the applicant had been indicted just over two months after the Internal Revenue Board had given its ruling and before that ruling had become final under section 15(2) of Act no. 30/1992 on the Internal Revenue Board (see paragraph 35 below). By contrast, the Supreme Court noted that in *A and B v. Norway* (cited above), an indictment had been issued one month and ten days before the ruling of the Norwegian Internal Revenue Board, but that in *Jón Ásgeir Jóhannesson and Others* (cited above) one year and almost four months had passed from the giving of the ruling until the indictment.

29. The Supreme Court then noted that in the applicant's case, three years and almost four months had elapsed from the indictment until the case had been heard by the Supreme Court, compared to one year and just over eleven months from the relevant indictment until the Supreme Court judgment in *A and B v. Norway* (cited above), and four years and almost two months in *Jón Ásgeir Jóhannesson and Others* (cited above). In that respect, the Supreme Court deemed that the repeated staying of the judicial proceedings against the applicant in anticipation of the judgment in the case of *Jón Ásgeir Jóhannesson and Others* had to be taken into account.

30. Lastly, the Supreme Court observed that the two sets of proceedings had been conducted in parallel for a period of eleven months, counting from the applicant's first questioning as a suspect until the Internal Revenue Board had given its ruling. By contrast, the proceedings in respect of *A and B v. Norway* (cited above) had been conducted in parallel for just over eleven months, and the proceedings in respect of *Jón Ásgeir Jóhannesson and Others* (cited above) had been conducted in parallel for twelve months.

31. Taking all of the above into account, the Supreme Court found as follows:

“According to what has been recounted here regarding the length of time of the proceedings against the accused it must be concluded, in the same manner as did the [European Court of Human Rights] in the case of [*A and B v. Norway* (cited above)] that the criterion of a sufficient connection in time was satisfied. In the overall assessment of all time factors involved this conclusion is not altered, despite the difference that in the [applicant's] case on the one hand, and the case of *A and B v. Norway* on the other hand, the indictment in the former case was issued two months and nine days after the conclusion of the administrative proceedings and in the latter case one month and ten days before the conclusion of the administrative proceedings in Norway. It cannot be concluded that this fact on its own caused the [applicant] immoderate uncertainty or resulted in unnecessary delays in the proceedings. In this regard it must be borne in mind that the Internal Revenue Board's ruling in the [applicant's] case had not become finally binding when the indictment against him was issued. It must also be noted that the [European Court of Human Rights] has

found that proceedings in respect of two separate cases need not be completely parallel from beginning to end, but that the State involved has leeway to conduct proceedings progressively where doing so is motivated by interests of efficiency and the proper administration of justice in the light of different social purposes. Mere chance can determine whether an indictment is issued shortly before or after the conclusion of a case at the administrative level.”

32. Having regard to all of the above, the Supreme Court concluded that the proceedings against the applicant had complied with the requirement that they be sufficiently connected in both time and substance, and had therefore not violated Article 4 of Protocol No. 7 to the Convention. The Supreme Court accordingly dismissed the applicant’s demand for the dismissal of the case against him (see paragraph 20 above). Finding no fault with the substance of the District Court’s judgment, the Supreme Court went on to uphold both the applicant’s conviction and his sentence. The Supreme Court furthermore sentenced the applicant to pay appeal costs in the amount of ISK 1,782,579, including the legal fees of his appointed counsel, which amounted to ISK 1,736,000 (approximately EUR 10,500 at the material time).

33. One of the seven judges sitting on the bench hearing the applicant’s case appended a dissenting opinion to the judgment, finding that the requirements regarding a sufficient connection in substance and in time had not been fulfilled and that the case against the applicant should accordingly be dismissed. The dissenting opinion noted that the police were not under an obligation to merely extend a tax investigation that had already been conducted by other authorities, and found that the prosecutor’s questioning of the applicant had involved a duplication of the investigation that had previously been conducted. The dissenting opinion furthermore noted that the applicant had been indicted after the Internal Revenue Board had given its ruling, and reasoned that the fact that the criminal proceedings in question had lasted for three and a half years could not be justified by the postponement of the case in question pending the delivery of the judgment of the European Court of Human Rights in respect of the case of *Jón Ásgeir Jóhannesson and Others* (cited above). The dissenting opinion thus found the two sets of proceedings to be so disconnected as to violate the principle of *ne bis in idem* and require the dismissal of the case.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

34. The relevant sections of the Income Tax Act (*Lög um tekjuskatt*) read as follows at the material time:

Section 108

“If an entity that is obliged to submit a tax return does not do so by the given deadline, the Director of Internal Revenue is permitted to add a surcharge of up to 15% to his tax-base estimate. The Director of Internal Revenue is nonetheless

required to take note of the extent to which taxation has taken place through the withholding of taxes [at source]. The Director of Internal Revenue sets out further rules regarding that point. If a tax return on the basis of which taxes will be levied is submitted after the filing deadline, but before a Local Tax Commissioner completes [his or her] assessment of the taxes due, then a surcharge of only 0.5% may be added to the tax base for each day that the filing of the tax return [in question] has been delayed after the deadline in question, [up to a total surcharge of no more than] 10%.

If a tax return is incorrect, as noted in section 96, or specific items [on a tax return] are declared erroneously, the Director of Internal Revenue can add a 25% surcharge to the estimated or erroneously declared tax base. If a tax entity corrects such errors or adjusts specific items in the tax return before taxes are assessed, the surcharge imposed by the Director of Internal Revenue may not be higher than 15%.

Additional surcharges, in accordance with this section, are to be cancelled if a tax entity can show (citing justifying factors) that it is not to blame for faults in a tax return or for a failure to file one, that *force majeure* rendered it impossible by the relevant deadline, to file a tax return, to rectify an error in a tax return, or to correct specific items contained therein.

Complaints to the Directorate of Internal Revenue and the Internal Revenue Board are subject to the provisions of section 99 of the Act and the provisions of Act no. 30/1992 on the Internal Revenue Board.”

Section 109

“If a taxable person, intentionally or through gross negligence, makes false or misleading statements about something that affects [that person’s] liability for income tax, that person shall pay a fine of up to ten times the tax amount of the tax base that was concealed [but] a fine no lower than double [that] amount. Tax paid on a surcharge pursuant to section 108 shall be deducted from the fine. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a taxable person, intentionally or through gross negligence, neglects to file a tax return, that violation shall incur a fine no lower than double the tax that should have been paid on the undeclared tax base, if the tax evaluation proved to be too low when taxes were re-assessed, in accordance with paragraph 2 of section 96 of this Act, in which case the tax on the added surcharge shall be deducted from the amount of the fine, in accordance with section 108. Paragraph 1 of Article 262 of the Penal Code applies to major offences against this provision.

If a taxable person gives false or misleading information on any aspects regarding [his or her] tax return, then that person can be made to pay a fine, even if the information cannot affect his liability to pay taxes or [make] tax payments.

If violations of paragraph 1 or paragraph 2 of the provision are discovered when the estate of a deceased person is wound up, then the estate shall pay a fine of up to four times the amount of tax owed on the tax base that was evaded, but no less than [that] amount plus half of that amount [again]. Tax on a surcharge pursuant to section 108 shall be deducted from such a fine. Under the circumstances stated in paragraph 3, the estate may be fined.

Any person who wilfully or through gross negligence provides tax authorities with wrongful or misleading information or documentation regarding the tax returns of other parties, or assists [in the submission of] a wrongful or misleading tax return to tax authorities, shall be subject to the punishment provided in paragraph 1 of this section.

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If a person, intentionally or through gross negligence, has neglected his duties, as listed under the provisions of sections 90, 92 or 94, he shall pay a fine or be sentenced to imprisonment for up to two years.

An attempted violation [or acting as an] accessory to a violation of this Act is punishable under the provisions of Chapter III of the Penal Code and is subject to a fine of up to the maximum amount stated in other provisions of this section.

A legal entity may be fined for a violation of this Act, irrespective of whether the violation may be attributable to the criminal act of an officer or employee of that legal entity. If one of its officers or employees has been guilty of violating this Act, the legal entity in question may be subject to a fine and the withdrawal of its operating licence, in addition to the imposition of punishment, in the event that the violation was committed for the benefit of that legal entity and it has profited from that violation.”

Section 110

“The Internal Revenue Board rules on fines [imposed] under section 109, unless a case is referred for investigation and judicial treatment, in accordance with paragraph 4 [of this provision]. Act 30/1992 on the Internal Revenue Board applies to the Board’s handling of cases.

The Directorate of Tax Investigations in Iceland appears before the Board on behalf of the State when [the Board] rules on fines. The rulings of the Board are final.

Notwithstanding the provision set out in paragraph 1, the Directorate of Tax Investigations (or a legal representative thereof) is permitted to offer a party the option of ending the criminal proceedings in respect of a case by paying a fine to the Treasury, provided that the offence is considered to be proven beyond doubt, in which event the case is neither to be sent to the police for investigation nor to fine proceedings with the Internal Revenue Board. When deciding the amount of the fine [to be paid], note is to be taken of the nature and scale of the offence [in question]. Fines may amount to between ISK 100,000 and ISK 6,000,000. The entity in the case is to be informed of the proposed amount of the fine [in question] before it agrees to end the case in such a manner. A decision on the amount of a fine under this provision must be made within six months of the end of the investigation conducted by the Directorate of Tax Investigations.

Decisions delivered by the Directorate of Tax Investigations shall provide no alternative penalty. Regarding the collection of a fine imposed by the Directorate of Tax Investigations the same rules apply under this Act as those regarding taxes – including the right to carry out distraint. The Director of Public Prosecutions is to be sent a record of all cases that have been closed under this provision. If the Director of Public Prosecutions believes that an innocent person has been subjected to a fine under paragraph 2, or that the manner of concluding the case has been improbable [*ffjarstæð*] in other ways, he can refer the case to a judge in order to have the decision of the Directorate of Tax Investigations overturned.

The Directorate of Tax Investigations can, of its own accord [or] at the request of the accused (if he is opposed to the case being dealt with by the Internal Revenue Board, in accordance with paragraph 1), refer a case to the police for investigation.

Claims for tax may be made and adjudicated in criminal proceedings for offences against the Act.

Fines [collected] for offences against this Act go to the Treasury.

Internal Revenue Board rulings imposing a fine shall not provide an alternative penalty. Regarding the collection of a fine issued by the Internal Revenue Board the same rules apply under this Act as those regarding taxes – including the right to carry out distraint.

[Offences] under section 109 become time-barred after six years. The limitation period may be interrupted by the opening of an investigation by the Directorate of Tax Investigations, as long as there are no unnecessary delays in the investigation of the case in question or in sentencing.”

35. The relevant sections of the Internal Revenue Board Act (*Lög um yfirskattanefnd*) read as follows at the material time, in so far as relevant:

Section 5

“The time-limit for appealing to the Internal Revenue Board shall be three months from the dispatch by post of the ruling of the Directorate of Internal Revenue.

...”

Section 15

“...

The Minister’s time-limit for instituting judicial proceedings in relation to a ruling of the Internal Revenue Board is six months.

...”

36. Article 262 of the General Penal Code (*Almenn hegningarlög*) stipulates:

“Any person who intentionally or through gross negligence is guilty of a major violation of the first, second or fifth paragraphs of section 109 of Act no. 90/2003 on Income Tax (see also section 22 of the Act on Municipal Tax Revenues and the first, second and seventh paragraphs of section 30 of the Act on the Withholding of Public Levies [*opinber gjöld*] at Source – see also section 11 of the Act on Payroll Taxes) and the first and sixth paragraphs of section 40 of the Act on Value Added Tax shall be subject to a maximum of six years’ imprisonment. An additional fine may be imposed by virtue of the provisions of the tax laws cited above.

The same punishment may be imposed on a person who intentionally or through gross negligence is guilty of a major violation of the third paragraph of section 30 of the Act on the Withholding of Public Levies at Source; of the second paragraph of section 40 of the Act on Value Added Tax; of sections 37 and 38 (in conjunction with section 36) of the Act on Accounting; or of sections 83-85 (in conjunction with section 82) of the Act on Annual Accounts, including [such violations that are perpetrated] with the intent to conceal an acquisitive offence [*auðgunarbrot*] committed by oneself or by others.

An action constitutes a major violation under the first and second paragraphs of this Act if the violation involves significant amounts of money [or] if the action is committed in a particularly flagrant manner or under circumstances that greatly exacerbate the culpability of the violation, and also if the person to be sentenced to punishment for any of the violations referred to in the first or second paragraph has previously been convicted for a similar violation or any other violation covered by those provisions.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 7 TO THE CONVENTION

37. The applicant complained that, through the imposition of tax surcharges and the subsequent criminal trial and conviction for major tax offences, he had been tried and punished twice for the same offence. He relied on Article 4 of Protocol No. 7 to the Convention, which, in so far as relevant, reads as follows:

“1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

...”

A. Admissibility

38. The Government did not raise any objections to the admissibility of the complaint under Article 4 of Protocol No. 7 to the Convention. The Court notes that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *Submissions by the parties*

(a) **The applicant**

39. The applicant submitted that the two sets of proceedings against him had both constituted “criminal proceedings” for the purpose of Article 4 of Protocol No. 7 to the Convention and that both sets of proceedings had concerned the “same offence”.

40. Concerning the element of a connection in substance between the two sets of proceedings, the applicant submitted that despite having access to the report of the Directorate of Tax Investigation, the prosecutor had nevertheless conducted an independent investigation, significantly delaying the criminal proceedings. The applicant submitted that his conduct and liability under tax and criminal law had been examined by different authorities in proceedings that had been largely, if not entirely, independent of each other.

41. Concerning the element of a connection in time between the two sets of proceedings, the applicant submitted that the criminal proceedings could not be considered to have been initiated until 11 April 2013, when the applicant had been first interrogated by the police. The applicant submitted that the two sets of proceedings had thus only progressed in parallel for eleven months, and that the criminal proceedings had later continued for another three years and six months.

42. Concerning the postponement of the proceedings before the District Court (see paragraph 17 above), the applicant protested the characterisation of the postponement as having been decided at the request of the applicant, submitting that the postponement had been decided on the District Court's own initiative.

(b) The Government

43. The Government did not deny that the imposition of a tax surcharge, pursuant to section 108(2) of the Income Tax Act, had constituted a penalty for the purposes of Article 4 of Protocol No. 7 to the Convention. Furthermore, the Government did not deny that the two sets of proceedings had been rooted in the same events.

44. The Government submitted that it was not necessary to determine whether and when the first set of proceedings had become final, as there had been a sufficient connection in time and substance between the two sets of proceedings as to avoid duplication. They submitted that the two sets of proceedings had constituted the foreseeable consequences of the applicant's conduct and that they had been initiated and conducted in accordance with the applicable legislation, which pursued separate and complementary objectives. Furthermore, the Government submitted that the applicant had enjoyed the guarantees afforded him in both sets of proceedings and that proportionality had been ensured.

45. Concerning the element of a connection in substance between the two sets of proceedings, the Government submitted that the audit by the tax authorities and the investigation by the prosecutor had pursued different objectives, since the respective penalties – and the conditions regarding the application of those penalties – had differed. They submitted that investigative material had been shared between the authorities involved and that the gathering and assessment of evidence had overlapped only to the extent that it had been unavoidable. Furthermore, the Government referred to section 109(1) of the Income Tax Act (see paragraph 34 above) and submitted that the surcharge imposed on the applicant by the tax authorities had been taken into account in the determination of the fine imposed on him in the criminal proceedings.

46. As regards the element of a connection in time, the Government reiterated the reasoning set out by the Supreme Court of Iceland, submitting that the connection had been sufficient to render the two sets of proceedings

one integrated whole. In that respect, the Government noted that the applicant had been indicted before the Internal Revenue Board's ruling became final and that the total time of the proceedings against the applicant had been six years and four months. The Government noted that the two sets of proceedings had been conducted in parallel for eleven months, but reasoned that if the criminal proceedings were counted from the time of the referral of the applicant's case from the Directorate of Tax Investigations to the prosecutor, the parallel conduct had lasted one year and four months.

47. Furthermore, the Government submitted that consideration should be given to (i) the length of time for which the hearing of the case by the District Court had been postponed at the applicant's request, pending the Court's judgment in the case of *Jón Ásgeir Jóhannesson and Others v. Iceland* (no. 22007/11, 18 May 2017), which had amounted to one year and five months, and (ii) the staying of the hearing by the Supreme Court on its own initiative for almost seven months, for the same reason. In that regard, the Government objected to the applicant's submission that the District Court had decided on postponement on its own initiative. The Government noted that the court records reflected that the initial postponement had occurred at the applicant's explicit request, pending the awaited judgment. The subsequent postponements had been justified by the statement that the awaited judgment had still not been delivered, without any objection on the part of the applicant being entered in the record. Lastly, the records of the main hearing reflected the fact that the case had, "at the request of the applicant" been "repeatedly stayed pending a judgment from the European Court of Human Rights on double jeopardy", and the record reflected no objection to that statement by the applicant. The Government thus submitted that the postponement had been made at the applicant's request, which should be taken into account for the purposes of the assessment of the connection in time.

2. *The Court's assessment*

48. Under Article 4 of Protocol No. 7 to the Convention, the Court has to determine whether the imposition of tax surcharges was criminal in nature, whether the criminal offence for which the applicant was prosecuted and convicted was the same as that for which the tax surcharges were imposed (the notion of the "same offence" – the *idem* element of the *ne bis in idem* principle), whether there was a final decision and whether there was duplication of the proceedings (the *bis* element of the *ne bis in idem* principle).

(a) **Whether the imposition of surcharges was criminal in nature**

49. In comparable cases involving the imposition of tax surcharges, the Court has held, on the basis of the "Engel criteria" (see *Engel and Others*

v. the Netherlands, 8 June 1976, § 82, Series A no. 22), that the proceedings in question were “criminal” in nature, not only for the purposes of Article 6 of the Convention but also for the purposes of Article 4 of Protocol No. 7 to the Convention (see, among other authorities, *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, §§ 107, 136 and 138, 15 November 2016, and *Jón Ásgeir Jóhannesson and Others*, cited above, § 43).

50. Noting that the parties did not dispute this, the Court concludes that both sets of proceedings in the present case concerned a “criminal” offence, within the autonomous meaning of Article 4 of Protocol No. 7.

(b) Whether the criminal offence for which the applicant was prosecuted and convicted was the same as that for which the tax surcharges were imposed

51. The notion of the “same offence” – the *idem* element of the *ne bis in idem* principle in Article 4 of Protocol No. 7 – is to be understood as a second “offence” arising from identical facts or facts which are substantially the same (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, §§ 78-84, ECHR 2009).

52. In the criminal proceedings in the present case, the applicant was indicted and convicted for major tax offences. It is undisputed between the parties that the facts underlying the indictment and conviction were the same or substantially the same as those leading to the imposition of tax surcharges.

53. The Court agrees with the parties. The applicant’s conviction and the imposition of tax surcharges were based on the same failure to declare income. Moreover, the tax proceedings and the criminal proceedings concerned the same period of time and the same amount in evaded taxes. Consequently, the *idem* part of the *ne bis in idem* principle is present.

(c) Whether there was a final decision

54. In the past, before determining whether there has been a duplication of proceedings (*bis*), in some cases the Court has first undertaken an examination of whether and, if so, when there was a “final” decision in one set of proceedings (potentially barring the continuation of the other set). However, the issue of whether a decision is “final” is devoid of relevance if there is no real duplication of proceedings but rather a combination of proceedings considered to constitute an integrated whole. In the present case, the Court does not find it necessary to determine whether and when the first set of proceedings – the tax proceedings – became “final”, as this circumstance does not affect the assessment given below of the relationship between them (see the above-cited cases of *A and B v. Norway*, §§ 126 and 142, and *Jón Ásgeir Jóhannesson and Others*, § 48).

(d) Whether there was a duplication of the proceedings (*bis*)

55. In the Grand Chamber judgment in the case of *A and B v. Norway* (cited above), the Court explained that Article 4 of Protocol No. 7 had not excluded the conducting of dual proceedings, even to their term, provided that certain conditions were fulfilled. In order to avoid a duplication of trial or punishment (*bis*) as proscribed by the provision, the respondent State had to demonstrate convincingly that the dual proceedings in question were “sufficiently closely connected in substance and in time” to be combined in an integrated manner so as to form a coherent whole. This implied not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.

56. In determining whether dual criminal and administrative proceedings are sufficiently connected in substance, several factors should be taken into account (*ibid.*, §§ 131-133). It should be assessed whether (i) the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved, (ii) the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*), (iii) the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence – notably through adequate interaction between the various competent authorities in order to ensure that the establishment of facts in one set of proceedings is also used in the other set of proceedings, and (iv) most importantly, the sanction imposed in the proceedings which become final first is taken into account in the proceedings which become final last, in order to prevent the individual concerned being ultimately made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of the penalties imposed is proportionate. Regard should also be paid to the extent to which the administrative proceedings bear the hallmarks of ordinary criminal proceedings. Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions imposed in the proceedings not formally classified as “criminal” are specific to the conduct in question and thus differ from “the hard core of criminal law”, as the significantly lower level of stigma attached to such proceedings renders it less likely that the combination of proceedings will give rise to a disproportionate burden being placed on the accused person (see *A and B v. Norway* (cited above), § 133).

57. In determining whether dual criminal and administrative proceedings are sufficiently connected in time, that requirement should not be interpreted as meaning that the two sets of proceedings have to be

conducted simultaneously from beginning to end (*ibid.*, § 134). However, the connection in time must be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time. The weaker the connection in time, the greater the burden on the State to explain and justify any such delays as may be attributable to its conduct of the proceedings.

58. In *A and B v. Norway* (cited above), the Court found that the conducting of dual proceedings, with the possibility of a combination of different penalties, had been foreseeable for the applicants, who must have known from the outset that criminal prosecution as well as the imposition of tax penalties was possible, or even likely, given the facts of their cases. The Court observed that the administrative and criminal proceedings had been conducted in parallel and were interconnected. The facts established in one of the sets of proceedings had been relied on in the other set and, as regards the proportionality of the overall punishment, the sentence imposed in the criminal trial had taken account of the tax penalty. The Court was satisfied that, while different penalties had been imposed by two different authorities within the context of different procedures, there had nevertheless been a sufficiently close connection between them, both in substance and in time, for them to be regarded as forming part of an overall scheme of sanctions under Norwegian law.

59. By contrast, in the case of *Jón Ásgeir Jóhannesson and Others* (cited above), for example, the Court found that the two individual applicants had been tried and punished twice for the same conduct. In particular, this was because the two sets of proceedings had both been “criminal” in nature; they had been based on substantially the same facts; and they had not been sufficiently interlinked for it to be considered that the authorities had avoided a duplication of proceedings. Although Article 4 of Protocol No. 7 did not rule out the carrying out of parallel administrative and criminal proceedings in relation to the same offending conduct, such sets of proceedings had to have a sufficiently close connection in substance and in time to avoid duplication. The Court held that there had not been a sufficiently close connection between the sets of proceedings in that case.

(i) *Connection in substance*

(α) *Complementarity of purposes*

60. Turning to an assessment of the case at hand, the Court must first determine whether the different sets of proceedings pursued complementary purposes and thus addressed different aspects of the social misconduct involved, not only *in abstracto* but also *in concreto* (see paragraph 56 above). The Court accepts that the two sets of proceedings pursued a complementary purpose in addressing the issue of a taxpayer’s failure to comply with the legal requirements relating to the filing of tax returns (see,

inter alia, *Ragnar Þórisson v. Iceland* [Committee], no. 52623/14, § 46, 12 February 2019, and *Jón Ásgeir Jóhannesson and Others*, cited above, § 51).

(β) Foreseeability

61. Secondly, the Court must determine whether the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice, of the same impugned conduct (see paragraph 56 above). In the present case, the Court accepts that the consequences of the applicant's conduct were foreseeable. Both the imposition of tax surcharges and the indictment and conviction for tax offences form part of the actions taken and sanctions levied under Icelandic law for failure to provide accurate information in a tax return (see, *inter alia*, the above-cited cases of *Jón Ásgeir Jóhannesson and Others*, § 51, and *Ragnar Þórisson*, § 46). Furthermore, the applicant was notified of the possible tax and criminal avenues that his case might take by a letter from the Directorate of Tax Investigation dated 30 December 2011 (see paragraph 20 above).

(γ) Avoidance of duplication in the collection and assessment of evidence

62. Thirdly, the Court must assess whether the relevant sets of proceedings were conducted in such a manner as to avoid as far as possible any duplication in the collection and the assessment of the evidence (see paragraph 56 above). In the present case, it is clear that the prosecutor had access to the report issued by the Directorate of Tax Investigations and its annexes, as well as the correspondence between the applicant and the Directorates of Tax Investigation and Internal Revenue (including the applicant's objections to the planned criminal proceedings – see paragraph 14 above). However, it is not clear to what extent the prosecutor's investigation relied on the findings made by the Directorate of Tax Investigations in order to avoid duplication between the two investigations. In this regard, documents pertaining to the details of the prosecutor's investigation (including transcripts of the questioning by the prosecutor of the applicant and other witnesses) have not been submitted to the Court.

63. In its judgment the Supreme Court held that there had been a sufficient connection in substance between the two sets of proceedings, as the tax proceedings had merely been aimed at uncovering whether the applicant had filed incorrect tax returns, whereas the criminal proceedings had been aimed at uncovering whether the requirements for the imposition of criminal sanctions – including the presence of intent or gross negligence – had been met. The Supreme Court furthermore found that the two sets of proceedings had not overlapped in terms of securing and assessing of evidence except to the extent that such an overlap had been unavoidable.

64. The issue of documents pertaining to the prosecutor’s investigation (see paragraph 62 above) notwithstanding, it is clear that the prosecutor undertook an investigation that lasted eighteen months, counting from the referral of the case to the prosecutor until the issuance of the indictment against the applicant. In *A and B v. Norway*, the Court emphasised that the avoidance of duplication should be achieved through adequate interaction between the various competent authorities in order to ensure that the facts established in one set of proceedings would also be used in the other set (see *A and B v. Norway*, cited above, § 132). Nevertheless, during the course of their investigation, the prosecutor interviewed the applicant twice, even though he had previously been questioned twice by the Directorate of Tax Investigation. The prosecutor also interviewed the witness that had previously been interviewed by the Directorate of Tax Investigation, along with three additional witnesses. Although the Court can accept that a criminal investigation under such circumstances aims at uncovering additional elements necessary for the pursuit of criminal charges and, as such, may have some unavoidable overlap with the tax investigation, the apparent overlap in the two investigations in the present case is considerable.

65. In the light of this, the Court harbours serious doubt as to whether the two sets of proceedings were conducted so as to avoid, to the extent possible, duplication in the obtaining and assessment of evidence.

(δ) Regard for previously imposed sanctions and their classification

66. Fourthly, the Court must ascertain whether the sanctions imposed in the proceedings that became final first were taken into account in those that became final last. The District Court – by a judgment that was subsequently upheld by the Supreme Court – sentenced the applicant to three months’ imprisonment, suspended for two years, and ordered him to pay a fine. In fixing the fine the District Court took into account the tax surcharges that had already been imposed on the applicant, albeit without providing any details regarding the calculations in this respect. Nevertheless, the Court considers that the sanctions already imposed in the tax proceedings were sufficiently taken into account in the sentencing in the criminal proceedings.

67. Additionally, under this element, regard may be had to whether the sanction imposed in the proceedings not formally classified as “criminal” was specific to the conduct in question and the extent to which those proceedings bore the hallmarks of ordinary criminal proceedings (see paragraph 56 above). In this respect, the Court notes that the tax surcharge imposed on the applicant in the tax proceedings was specific to the conduct concerned (that is to say filing incorrect tax returns) and was directly linked to the incorrectly filed tax base (see paragraph 34 above). Proceedings before the Directorate of Internal Revenue resulting in the imposition of such a surcharge are not classified as “criminal” under domestic law and are

free of many of the hallmarks of ordinary criminal proceedings, such as public hearings and the person involved acquiring a criminal record. Thus, these proceedings are to a significant extent free of the stigmatising factors typically associated with proceedings belonging to “the hard core of criminal law”. The combined proceedings in the present case were correspondingly less likely to have placed a disproportionate burden on the applicant (see *A and B v. Norway*, cited above, § 134).

(e) Conclusion concerning the connection in substance

68. In the light of the foregoing considerations, particularly the overlap in the two investigations, there is serious doubt as to whether the connection in substance between the two sets of proceedings was sufficiently close as to form a coherent, integrated whole. The Court will nevertheless proceed to an assessment of the connection in time, which the proceedings must also satisfy in order to comply with Article 4 of Protocol No. 7 (see *A and B v. Norway*, cited above, § 134).

(ii) *Connection in time*

(α) Demarcation of the relevant timeframe

69. At the outset of the assessment of a connection in time between the two sets of proceedings, the Court must determine the timeframe to be taken into account. In this regard, the Court recalls that a “criminal charge” exists from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 249, 13 September 2016, with further references).

70. On 3 May 2011 the Directorate of Tax Investigation initiated a tax audit of the applicant and interviewed him on 30 June and 30 November 2011. The investigation was finalised with the issuing of a report on 30 December 2011 and the matter was forwarded to the Directorate of Internal Revenue, which corresponded with the applicant and subsequently re-assessed his taxes by a decision of 30 November 2012. An appeal against that decision was lodged by the applicant with the Internal Revenue Board on 28 February 2013. The Board gave its ruling on 12 March 2014 and that ruling became final six months later.

71. Meanwhile, the Directorate of Tax Investigation referred the applicant’s case to the prosecutor on 12 November 2012, forwarding its report and additional material that it had collected in the course of its investigation. Five months later, on 11 April 2013, the applicant was questioned by the prosecutor. He was questioned by the prosecutor again on 14 August 2013. The prosecutor also questioned four additional witnesses,

one of whom had previously been questioned by the Directorate of Tax Investigations.

72. The prosecutor indicted the applicant on 21 May 2014. By a judgment of 15 March 2016, the District Court convicted the applicant of major tax offences. On 21 September 2017, the Supreme Court upheld the applicant's conviction. Thus, the overall length of the two sets of proceedings, from the initiation of the audit until the Supreme Court's final ruling, was about six years and four months.

(β) Assessment

73. The Court observes that within that overall period of six years and four months, the two sets of proceedings progressed concurrently between 11 April 2013 (when the applicant was questioned by the prosecutor) and 12 March 2014 (when the Internal Revenue Board issued its ruling on the applicant's tax appeal – see *Jón Ásgeir Jóhannesson and Others*, cited above, § 54). The proceedings were thus conducted in parallel for eleven months. If considered from the time when the matter was referred to the prosecutor for criminal investigation, of which the applicant was notified, the two sets of proceedings progressed in parallel for one year and four months (see *Bjarni Ármannsson v. Iceland* [Committee], no. 72098/14, § 56, 16 April 2019). The applicant was indicted on 21 May 2014, about two months after the Internal Revenue Board issued its ruling but four months before that ruling became final. The criminal proceedings then continued for three years after the Internal Revenue Board's ruling became final – a substantial amount of time, especially when compared to the length of the parallel proceedings. The burden on the State to explain and justify the delay consequently increases (see *A and B v. Norway*, cited above, § 134).

74. The Court notes that a substantial part of the delay in the procedure before the District Court was due to the applicant's request that a hearing in the case be stayed, pending the Court's judgment in the case of *Jón Ásgeir Jóhannesson and Others* (cited above). The court records confirm that the hearing of the case was stayed repeatedly from September 2014 until February 2016. In this regard, the Court notes that the submitted court records indicate that the initial postponement occurred at the applicant's request, that the records of the main hearing indicate that the repeated further postponements were made "at the request of the applicant" (see paragraph 17 above), and that the applicant apparently did not contest the accuracy of those records before submitting his observations to the Court. Such a delay at the request of the applicant will, in the Court's view, weigh less heavily on the assessment of a connection in time than delays that can be attributed to the authorities.

75. Nevertheless, the eleven months during which the two sets of proceedings ran parallel constitute only a small proportion of the six years

and four months total (see paragraph 72 above). In addition, the fact that the proceedings ran in parallel at all was due only to the fact that the applicant lodged an appeal in the tax proceedings, prolonging those proceedings by one year and almost four months. Had he not done so, the decision of the Directorate of Internal Revenue would have become final on 28 February 2013 (see paragraph 35 above) – two months before the applicant was first questioned by the prosecutor. In this regard, the Court reiterates that it is for the respondent State to demonstrate convincingly that the dual proceedings in question were sufficiently closely connected in substance and in time (see *A and B v. Norway*, cited above, § 130) and that it is incumbent on a State that conducts dual proceedings in respect of criminal offences to ensure that such proceedings are conducted in a manner compliant with the requirements of the *ne bis in idem* rule (see the above-cited cases of *A and B v. Norway*, § 117, and *Bjarni Ármannsson*, cited above, § 57). In ensuring such compliance, the State cannot rely on the affected person's exhaustion of available appeals in one part of the proceedings in question to create a link in time with the second part of the proceedings. Such a conclusion would work to the detriment of those who choose to pursue avenues of appeal, which should not weaken the rights they enjoy under Article 4 of Protocol No. 7.

76. In view of the above, the Court finds that the connection in time between the two sets of proceedings was insufficient to avoid a duplication of the proceedings.

(iii) Conclusion

77. The Court thus finds that the dual proceedings against the applicant were neither sufficiently connected in substance nor in time as to avoid a duplication of the proceedings. Consequently, the applicant was tried and punished for the same or substantially the same conduct by different authorities in two different sets of proceedings that lacked the required connection. There has therefore been a violation of Article 4 of Protocol No. 7 to the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. Pecuniary damage

79. The applicant claimed ISK 13,800,000 (approximately EUR 86,250 on 4 August 2020, when the applicant submitted his just satisfaction claims), the amount of the fine imposed on him, in respect of pecuniary damage. In this respect, he submitted documentation indicating that the fine had been paid.

80. The Government objected to the claim for pecuniary damage.

81. Having found that the two sets of proceedings against the applicant were insufficiently linked as to avoid a duplication, and that the criminal proceedings that resulted in the above-mentioned fine were thus in violation of Article 4 of Protocol No. 7, the Court considers that there is a causal link between the violation found and the pecuniary damage alleged. Furthermore, the applicant submitted documentation indicating that the fine had been paid in full. Consequently, the Court awards him in full the amount claimed – EUR 86,250, plus any tax that may be chargeable.

2. Non-pecuniary damage

82. The applicant claimed just satisfaction in respect of non-pecuniary damage in whatever amount the Court deemed appropriate.

83. The Government argued that if a violation of Article 4 of Protocol No. 7 to the Convention were to be found, such a finding by the Court would itself constitute just satisfaction for any non-pecuniary damage claimed.

84. The finding of a violation cannot be said to fully compensate the applicant for the sense of injustice and frustration that he must have felt. Making its assessment on an equitable basis, the Court therefore awards the applicant EUR 5,000 in respect of non-pecuniary damage.

B. Costs and expenses

85. The applicant claimed ISK 2,693,549 (approximately EUR 16,800) for the costs and expenses incurred before the domestic courts and an undetermined amount for costs incurred in the proceedings before the Court. He submitted legal-fee invoices and records of transfers of money from his account to that of his representative's law firm, bearing dates between September 2013 and November 2017, the last of which contains a reference to the hearing of the case by the Supreme Court. No invoices or bank-transfer receipts relating to the proceedings before the Court have been submitted.

86. The Government objected to the claim for costs and expenses.

87. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 16,800 in respect of costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

88. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning Article 4 of Protocol No. 7 admissible;
2. *Holds*, by four votes to three, that there has been a violation of Article 4 of Protocol No. 7 to the Convention;
3. *Holds*, by four votes to three,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 86,250 (eighty-six thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 16,800 (sixteen thousand eight hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 August 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Paul Lemmens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Lemmens, Dedov and Pavli is annexed to this judgment.

P.L.
M.B.

JOINT DISSENTING OPINION OF JUDGES LEMMENS,
DEDOV AND PAVLI

1. To our regret, we are unable to agree with the majority’s finding of a violation of Article 4 of Protocol No. 7 to the Convention. In our opinion, the Supreme Court correctly concluded that the existence of two separate proceedings did not violate the principle of “*ne bis in idem*”.

We agree with the majority that both sets of proceedings concerned a “criminal” offence, within the autonomous meaning of Article 4 of Protocol No. 7, and that the criminal offence for which the applicant was prosecuted and convicted was the same as that for which the tax surcharges had been imposed. We also agree that the issue as to whether or not there was a final decision in the tax proceedings is devoid of relevance in the present case.

Our disagreement concerns the question whether there was a duplication of the proceedings (the “*bis*” element of the “*ne bis in idem*” principle) (see paragraphs 55-77 of the judgment).

2. At the outset, we wish to express our agreement with the general principles set out in *A and B v. Norway* ([GC], nos. 24130/11 and 29758/11, § 130, 15 November 2016) and reiterated in paragraph 55 of the present judgment. In particular, we agree that, for the Court to be satisfied that there is no duplication of trial or punishment as proscribed by Article 4 of Protocol No. 7, the respondent State must demonstrate convincingly that the dual proceedings in question have been “sufficiently closely connected in substance and in time” or, in other words, that both proceedings have been combined in an integrated manner so as to form “a coherent whole”.

Connection in substance

3. Turning, first, to the connection in substance between the tax proceedings and the criminal proceedings in the present case, we agree with the majority that the two sets of proceedings pursued a complementary purpose (see paragraph 60 of the judgment). It seems to us, however, that the majority do not attach appropriate weight to this aspect of the test, which in our opinion is of crucial importance.

We would recall that the tax surcharge was imposed because of the filing of incorrect tax returns (see section 108, second paragraph, of the Income Tax Act). The applicant was further charged with the criminal offence of making false or misleading statements “intentionally or through gross negligence” (section 109, first paragraph, of the Income Tax Act), with the aggravating circumstance that the offence was a “major” one (Article 262, paragraph 1, of the General Penal Code). We therefore agree with the Supreme Court that the “proceedings pursued by the tax authorities [were] aimed at revealing other factors than those investigated by the police and adjudicated by the courts” (see paragraph 23).

There is a remarkable correspondence between the statutory provisions that were applied in the applicant's case and those that were applied in the Norwegian cases of A and B. With respect to the latter, the Court observed that "the administrative penalty of a tax surcharge served as a general deterrent, as a reaction to a taxpayer's having provided, perhaps innocently, incorrect or incomplete returns or information", whereas the "criminal conviction ... served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud" (see *A and B v. Norway*, cited above, § 144). We find that a similar assessment can be made in the applicant's case.

We find, moreover, that the Icelandic legislature had good reasons to opt for "[the regulation of] the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process", and that the competent authorities had good reasons to choose, in the applicant's case, "to deal separately with the more serious and socially reprehensible aspect of [intentionally or through gross negligence making false or misleading statements] in a criminal procedure rather than in the ordinary administrative procedure" (see *A and B v. Norway*, cited above, § 146; see also *ibid.*, § 152).

4. Furthermore, like the majority, we are of the opinion that the conduct of dual proceedings, with the possibility of different cumulated penalties, was foreseeable for the applicant (see paragraph 61 of the judgment). Apart from the legislative framework, which made it clear that the failure to provide accurate information in a tax return could lead to tax surcharges as well as to criminal sanctions, the applicant was from the outset explicitly informed of the possibility, or even the likeliness, of criminal proceedings, in addition to the tax proceedings, and he was also informed, at an early stage, of the actual reference of his case by the tax authorities to the Office of the Special Prosecutor (see paragraphs 7, 14 and 61; compare *A and B v. Norway*, cited above, §§ 146 and 152).

5. The majority consider that "the apparent overlap in the two investigations in the present case is considerable" (see paragraph 64 of the judgment) and therefore "[harbour] serious doubt as to whether the two sets of proceedings were conducted so as to avoid, to the extent possible, duplication in the obtaining and assessment of evidence" (see paragraph 65).

On this point, we respectfully disagree.

As acknowledged by the majority, "it is clear that the prosecutor had access to the report issued by the Directorate of Tax Investigations and its annexes, as well as to the correspondence between the applicant and the Directorates of Tax Investigation and Internal Revenue (including the applicant's objections to the planned criminal proceedings)" (see

paragraph 62). The prosecutor nevertheless also undertook his own investigation. It is true that he interviewed the applicant twice, and that he also interviewed the one witness who had previously been questioned by the Directorate of Tax Investigations. However, he also questioned three additional witnesses who had not previously been questioned by the Directorate (see paragraph 64). As the Supreme Court underlined, the prosecutor's investigation "had been aimed primarily at [uncovering] whether the applicant's alleged offences had been major, whether they had been carried out with intent or gross negligence, and whether persons other than the applicant had been involved" (see paragraph 24).

We find it difficult to conclude, in these circumstances, that the overlap in the two investigations was "considerable". Rather, we find that the two sets of proceedings were interconnected: on 12 November 2012 the tax audit report was forwarded to the Office of the Special Prosecutor (see paragraph 14 of the judgment) and the prosecutor's indictment of 21 May 2014 was obviously based on the State Internal Revenue Board's ruling of 12 March 2014 revising upwards the applicant's income and re-assessing the applicant's tax liability accordingly (see paragraphs 12 and 16). The chronology of the facts thus makes it clear that the establishment of facts made in the tax proceedings, in particular the finding that the applicant had submitted incorrect tax returns, was relied upon in the criminal proceedings (compare *A and B v. Norway*, cited above, §§ 146 and 152; see also *Matthildur Ingvarsdóttir v. Iceland* (committee) (dec.), no. 22779/14, § 59, 4 December 2018, and, *a contrario*, *Jóhannesson and Others v. Iceland*, no. 22007/11, § 53, 18 May 2017). In short, the criminal investigation built on the findings in the tax proceedings: while the applicant's failure to file correct tax returns was established in the tax proceedings, it was on the basis of that finding that the criminal investigation examined the further question whether the offences had been carried out with intent or gross negligence. There was therefore an "adequate" "interaction" between the two proceedings (compare *Bajčić v. Croatia*, no. 67334/13, § 43, 8 October 2020).

The mere fact that the applicant and one of the witnesses were interviewed both by the tax authorities and by the prosecutor is, in our opinion, not enough to conclude that there was no sufficiently close connection in substance between the two sets of proceedings.

6. Finally, we note that the majority admit that the sanctions imposed in the tax proceedings were taken into sufficient account at the sentencing stage of the criminal proceedings (see paragraph 66 of the judgment; compare *A and B v. Norway*, cited above, §§ 146 and 152). We agree.

In our opinion, this is a very important feature of the second set of proceedings, since it ensures "that the overall amount of [the] penalties imposed is proportionate" (see *A and B v. Norway*, cited above, § 132).

Connection in time

7. Turning, next, to the connection in time between the tax proceedings and the criminal proceedings, we note that the majority, following the approach adopted by the Supreme Court (see paragraphs 25-31 of the judgment), place great emphasis on the overall length of the two sets of proceedings (see paragraphs 69-72) and on the duration of the criminal proceedings after the ruling in the tax proceedings had become final (see paragraphs 73-75).

On this point, again, we respectfully disagree.

The connection in time is not a matter of the *duration* of proceedings, even if the requirement of a close connection in time is intended “to protect the individual from being subjected to uncertainty and delay from proceedings becoming protracted over time” (see *A and B v. Norway*, cited above, § 134). It is the temporal *connection* between the two proceedings that matters.

8. In our opinion, there was indeed a close connection in time.

At a point when the tax proceedings were ongoing, the Directorate of the Tax Investigations referred the case to the Office of the Special Prosecutor (see paragraph 14 of the judgment). The prosecutor undertook his own investigation while the tax proceedings were still ongoing (see paragraph 15). As soon as the tax proceedings had come to an end, the prosecutor indicted the applicant and filed the case with the District Court (see paragraph 16). In our view, this sequence of events is indicative of a close connection in time between the two sets of proceedings.

It is true that the criminal proceedings then proceeded for a further three years and four months, until the Supreme Court’s judgment of 21 September 2017. While this is a lengthy period, we do not think that it suffices to sever the close connection in time established at the outset between the two sets of proceedings.

Overall conclusion

9. For the reasons set out above, we are of the opinion that, “whilst different sanctions were imposed by two different authorities in different proceedings, there was nevertheless a sufficiently close connection between them, both in substance and in time, to consider them as forming part of an integral scheme of sanctions” for failure to declare income on tax returns correctly (see, *mutatis mutandis*, *A and B v. Norway*, cited above, § 147; see also *ibid.*, § 153, and *Matthildur Ingvarsdóttir*, cited above, § 64).

Accordingly, we conclude that there has been no violation of Article 4 of Protocol No. 7.