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

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Use as evidence of absent witness's telephone recording did not make trial unfair in view of other decisive evidence

In today's **Chamber** judgment[1] in the case of Seton v. the United Kingdom (application no. 55287/10) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 in conjunction with Article 6 § 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses) of the European Convention on Human Rights.

The case concerned the complaint of a criminal convict about the admission of evidence of an absent witness at his trial.

The Court applied the principles established in its Grand Chamber judgments in two cases concerning the absence of witnesses at a public trial, *Al-Khawaja and Tahery v. the United Kingdom* and *Schatschaschwili v. Germany* (2011 and 2015 respectively).

It found that the criminal proceedings as a whole had not been rendered unfair by the admission in evidence of the recordings of the absent witness's telephone conversations, having regard to the fact that there had been other decisive incriminating evidence, and that the trial judge had applied procedural safeguards capable of counterbalancing the witness's absence at trial.

Principal facts

The applicant, John Edward Seton, is a British national who was born in 1983 and is currently detained at HMP Whitemoor (England, UK).

Suspected of having committed a murder on 31 March 2006, Mr Seton served a Defence Statement in April 2008 in which he alleged that another man, Mr Pearman, had murdered the victim. Mr Pearman had previously been convicted of serious drug and firearm offences and was, at the time of Mr Seton's statement, serving a prison sentence for murder. In July 2008 the police interviewed Mr Pearman about those allegations. He answered "no comment" to the questions asked. In subsequent phone conversations with his son and his wife he stated that he had never heard of Mr Seton and denied any involvement in the murder. Both conversations were recorded, as was the practice for prisoners of Mr Seton's security category.

At Mr Seton's trial for murder, which started in August 2008, Mr Pearman was asked to give evidence but refused to do so. At the request of the prosecution the judge ruled that the recordings of Mr Pearman's telephone conversations should be admitted in evidence. In addition to playing the tapes, the prosecution relied on further evidence, including evidence showing that Mr Seton and the victim had been involved in drug dealing together and that Mr Seton had been in debt to the victim. On 26 August 2008 the jury convicted Mr Seton of murder. He was sentenced to life imprisonment with a minimum term of 30 years.

In March 2010 the Court of Appeal dismissed Mr Seton's appeal. While the Court of Appeal found that the judge of the trial court could have compelled Mr Pearman to come to the court, it

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

considered that "the prospect of any sensible evidence being given by him was, on any realistic view, nil." Moreover, the Court of Appeal found that in any event the evidence against Mr Seton, though circumstantial, was overwhelming. In particular: the only evidence of Mr Pearman's involvement had been Mr Seton's allegation; there was evidence that Mr Seton had been in debt to the victim and the victim had been pressing for payment, meaning that Mr Seton had had a motive to kill the victim; Mr Seton had made the allegation of Mr Pearman's involvement only very late during the investigation; Mr Seton had fled the country shortly after the murder; and the witness descriptions of the gunman seen near the scene of the crime matched Mr Seton but not Mr Pearman.

Complaints, procedure and composition of the Court

Mr Seton complained that the admission of the telephone recordings and the refusal of the trial judge to order that Mr Pearman be produced as a witness had been in violation of his rights under Article 6 §§ 1 and 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses).

The application was lodged with the European Court of Human Rights on 13 September 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"), *President*,
Ledi **Bianku** (Albania),
Linos-Alexandre **Sicilianos** (Greece),
Paul **Mahoney** (the United Kingdom),
Aleš **Pejchal** (the Czech Republic),
Robert **Spano** (Iceland),
Armen **Harutyunyan** (Armenia),

and also André **Wampach**, *Deputy Section Registrar.*

Decision of the Court

The Court referred to the principles to be applied when a witness did not attend a public trial, which it had clarified in 2011 in its Grand Chamber judgment in the case of *Al-Khawaja and Tahery v. the United Kingdom* and in 2015 in its Grand Chamber judgment in the case of *Schatschaschwili v. Germany*.[2] Notably, the Court had to examine: whether there was a good reason for the non-attendance of the witness at trial; whether the evidence of the absent witness was "sole or decisive"; and whether there were sufficient "counterbalancing factors" permitting a fair and proper assessment of the reliability of the evidence in question. In the 2015 judgment the Court had confirmed that the absence of a good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial, although it remained a very important factor to be weighed in the balance when assessing the overall fairness.

Given that in the case at hand the evidence by Mr Pearman had been used by the prosecution to rebut the only defence advanced by Mr Seton, the principles established in those two Grand Chamber judgments applied to the facts of the case.

The Court was not persuaded that all reasonable efforts had been made to secure the attendance of Mr Pearman. The trial court could have compelled him to attend, even if it could not have compelled him to give evidence. According to Mr Seton, even if Mr Pearman could have exercised his right to remain silent, had he attended, the jury would still have been able to see him and assess his

[2] *Al-Khawaja and Tahery v. the United Kingdom (26766/05 and 22228/06*), Grand Chamber judgment of 15 December 2011; *Schatschaschwili v. Germany (9154/10*), Grand Chamber judgment of 15 December 2015

behaviour in response to cross-examination. However, the Court underlined that, having regard to the clarification in its 2015 judgment in the case of *Schatschaschwili,* the absence of a good reason for Mr Pearman's non-attendance was not of itself conclusive as regards the overall fairness of the trial.

While the recorded evidence of Mr Pearman had assisted the prosecution in rebutting Mr Seton's defence, that evidence could not be described as determinative of the outcome of the case. On the contrary, the appeal court had considered the other incriminating evidence against Mr Seton to be overwhelming; it therefore had had no doubt about the safety of his conviction quite apart from the telephone recordings. In that light, the Court concluded that the evidence of the absent witness, Mr Pearman, could not be said to be "sole or decisive".

Given that the domestic courts had nevertheless characterised Mr Pearman's evidence as important, the Court still needed to assess whether there existed sufficient "counterbalancing factors". In ruling that the recordings of the telephone conversations should be admitted in evidence, the trial judge had had proper regard to the procedural safeguards provided for in the domestic legislation. Before admitting the recordings, he had weighed in the balance their value and significance to the proceedings, their reliability, the difficulty Mr Seton would have challenging them and the prejudice any such difficulty would cause. Moreover, the jury had been told, in particular, about Mr Pearman's previous convictions and had been advised that they could use this information in deciding whether he was likely to have committed the murder and in assessing the credibility of his denials. Finally, the jury had been cautioned about the limitations of tape recorded evidence and the fact that Mr Pearman's statements were essentially "self-serving".

Having regard to all those factors, it could not be said that the criminal proceedings as a whole had been rendered unfair by the admission in evidence of the telephone recordings. Accordingly, there had been no violation of Article 6 § 1 in conjunction with Article 6 § 3 (d).

The judgment is available only in English.

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