

Press release issued by the Registrar

**CHAMBER JUDGMENT**  
**AL-KHAWAJA AND TAHERY v. THE UNITED KINGDOM**

The European Court of Human Rights has today notified in writing its Chamber judgment<sup>1</sup> in the case of *Al-Khawaja and Tahery v. the United Kingdom* (application nos. 26766/05 and 22228/06).

The Court held unanimously that in both cases there had been a **violation of Article 6 § 1 in conjunction with Article 6 § 3 (d)** (right to a fair trial) of the European Convention on Human Rights concerning the decisions to allow statements from absent witnesses to be read at the applicants' trial.

Under Article 41 (just satisfaction) of the Convention, the Court awarded each applicant 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 14,198 (less EUR 2,300 already received in legal aid from the Council of Europe) for costs and expenses. ([The judgment is available only in English.](#))

**1. Principal facts**

The applicants, Imad Al-Khawaja and Ali Tahery, lodged two distinct applications which the Court decided to join.

***Al-Khawaja***

Imad Al-Khawaja is a British national who was born in 1956 and lives in Brighton (United Kingdom).

While working as a consultant physician in the field of rehabilitative medicine, he was charged on two counts of indecent assault on two female patients while they were allegedly under hypnosis. One of the complainants, S.T, committed suicide (taken to be unrelated to the assault) before the trial but, prior to her death, had made a statement to the police.

On 22 March 2004 it was decided that her statement should be read to the jury. The judge stated that the contents of the statement were crucial to the prosecution on count one as there was no other direct evidence of what took place; "putting it bluntly, no statement, no count

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<sup>1</sup> Under Article 43 of the Convention, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

one.” The defence accepted that if the statement were read to the jury at trial they would be in a position to rebut it through the cross-examination of other witnesses.

During Mr Al-Khawaja’s trial, the jury heard evidence from a number of different witnesses and the defence were given the opportunity to cross-examine other witnesses. The trial judge directed the jury as to how they should regard the statement of the deceased complainant, pointing out to the jury that they had not seen her give evidence or be cross-examined and that the allegations were denied.

Mr Al-Khawaja was convicted by a unanimous verdict on both counts of indecent assault. He was sentenced to a 15 month custodial sentence on the first count and a 12 month custodial sentence on the second count, to run consecutively.

He appealed unsuccessfully. The Court of Appeal considered the trial judge’s directions to be “adequate” and did not consider that there had been any violation of Article 6 (right to a fair trial) of the European Convention on Human Rights. All further appeals by the applicant failed.

### ***Tahery***

Ali Tahery is an Iranian national who was born in Tehran in 1975 and lives in London.

On 19 May 2004 he allegedly stabbed S. three times in the back and was subsequently charged with wounding with intent and attempting to pervert the course of justice by telling the police that he had seen two black men stab S.

When witnesses were questioned at the scene, no-one claimed to have seen the applicant stab S. Two days later however one of the witnesses, T., made a statement to police that he had seen the applicant stab S.. In S.’s statement to the police, it is clear that he did not see who stabbed him.

The applicant was tried before Blackfriars Crown Court. On 26 April the prosecution successfully applied for leave to read T.’s statement under section 116(2) (e) and (4) of the Criminal Justice Act 2003 on the ground that T. was too frightened to appear in court. T.’s witness statement was then read to the jury in his absence. The applicant also gave evidence. The judge, in his summing up, warned the jury about the danger of relying on T.’s evidence.

On 29 April 2005, the applicant was convicted by a majority verdict, principally of wounding with intent to cause grievous bodily harm, and later sentenced to 10 years and three months imprisonment.

The applicant appealed, arguing that his right to a fair trial had been infringed because he was not able to have T. cross-examined. The appeal was unsuccessful. However, the Court of Appeal acknowledged that, had T’s statement not been admitted, “the prospect of a conviction would have receded and that of an acquittal advanced”. The court stated that cross-examination of other prosecution witnesses, evidence from the applicant and bystanders could prevent unfairness. It was also stated that the trial judge had given the jury explicit directions on how to treat the statement in question. Further leave to appeal was refused.

## **2. Procedure and composition of the Court**

The applications were lodged with the European Court of Human Rights on 18 July 2005 in the case of *Al-Khawaja* and on 23 May 2006 in the case of *Tahery*. A hearing in both cases took place in public in the Human Rights Building, Strasbourg, on 8 January 2008 (Rule 59 § 3).

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

Josep **Casadevall** (Andorra), *President*,  
Nicolas **Bratza** (United Kingdom),  
Giovanni **Bonello** (Malta),  
Kristaq **Traja** (Albania),  
Ljiljana **Mijović** (Bosnia and Herzegovina),  
Ján **Šikuta** (Slovakia),  
Päivi **Hirvelä** (Finland), *judges*,

and also Lawrence **Early**, *Section Registrar*.

### 3. Summary of the judgment<sup>1</sup>

#### Complaint

Relying on Article 6 §§ 1 and 3 (d) (right to obtain attendance and examination of witnesses), the applicants complained that their convictions were based to a decisive degree on statements from witnesses who could not be cross-examined in court and that they were therefore denied a fair trial.

#### Decision of the Court

In both cases, the Court noted that the statements were the sole or, at least, the decisive basis for each applicant's conviction.

#### Concerning Mr Al-Khawaja

The Court did not find that any of the factors relied on by the United Kingdom Government, taken alone or together, could have counterbalanced the prejudice to the defence by admitting S.T.'s statement.

Firstly, had S.T.'s statement not been admitted, it was likely that Mr Al-Khawaja would only have been tried on count two of indecent assault and would only have had to give evidence in respect of that count.

Although there had been no suggestion of collusion between the complainants, the Court considered that the content of that statement, once admitted, had been evidence on count one that the applicant could not have effectively challenged.

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<sup>1</sup> This summary by the Registry does not bind the Court.

As to the judge's warning to the jury, the Court found that no direction could have effectively counterbalanced the effect of an untested statement which had been the only evidence against the applicant.

The Court therefore found a violation of Article 6 §§ 1 read in conjunction with Article 6 § 3(d) in respect of Mr Al-Khawaja.

#### Concerning Mr Tahery

The Court did not find that the factors relied on by the United Kingdom Government, whether considered individually or cumulatively, could have counterbalanced the grave handicap to the defence that arose from the admission of T.'s statement.

The Government noted that alternative measures, which would have been less restrictive on the rights of the defence than admitting witness statements, had been considered and found inappropriate. The Court observed that that rejection of alternative measures did not absolve the domestic courts of their responsibility to ensure the rights of the defence; indeed, it implied an even greater duty to protect those rights.

The Court also considered that T.'s statement could not have been effectively rebutted because there had been no other witnesses who were willing to testify. The applicant's right to give evidence himself to deny the charges could not be said to have counterbalanced the fact that there had been no opportunity to examine or cross-examine the only prosecution eye-witness against him.

Finally, the Court did not find that the warning by the Court of Appeal, however clearly expressed, had been sufficient to counterbalance the fact that the only direct evidence against the applicant was from an absent witness's untested statement.

The Court therefore also found a violation of Article 6 § 1 read in conjunction with Article 6 § 3(d) in respect of Mr Tahery.

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The Court's judgments are accessible on its Internet site (<http://www.echr.coe.int>).

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*The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.*