



European Court finds that use of hearsay evidence does not automatically prevent a fair trial

In today's Grand Chamber judgment in the case [Al-Khawaja and Tahery v. the United Kingdom](#) (application nos. 26766/05 and 22228/06), which is final¹, the European Court of Human Rights held that there had been:

No violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) (right to obtain attendance and examination of witnesses) of the European Convention on Human Rights, in respect of Mr Al-Khawaja; and,

A violation of Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention, in respect of Mr Tahery.

The cases concerned the applicants' complaint that their convictions had been based on statements from witnesses who could not be cross examined in court and that they had therefore been denied a fair trial.

The Court agreed with the domestic courts and found that a conviction based solely or decisively on the statement of an absent witness would not automatically result in a breach of Article 6 § 1. However, counterbalancing factors had to be in place, including strong procedural safeguards, to compensate for the difficulties caused to the defence.

Principal facts

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 he was charged on two counts of indecent assault on two female patients while they were allegedly under hypnosis. One of the complainants, ST, committed suicide (taken to be unrelated to the assault) before the trial. Prior to her death she had made a statement to the police.

At the trial it was decided that ST's 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 had taken place. 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 the trial, the jury heard evidence from a number of different witnesses, including the other complainant and two of ST's friends in whom she had confided promptly after the incident. The defence was given the opportunity to cross-examine all the witnesses who gave live evidence. In his summing up, the trial judge reminded the jury that they

¹ Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

had not seen ST 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 concluded that Mr Al-Khawaja's right to a fair trial under Article 6 (right to a fair trial) of the European Convention on Human Rights had not been breached. All his further appeals failed.

Tahery

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

On 19 May 2004 during a gang fight he allegedly stabbed another Iranian, 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 carry out the stabbing.

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 the police that he had seen Mr Tahery stab S.

Mr Tahery was tried before Blackfriars Crown Court in April 2005. During the trial, the prosecution applied for leave to read T's statement on the ground that he was too frightened to appear in court. The trial judge, who heard evidence from both T and a police officer, found that T was afraid of giving evidence although his fear was not caused by Mr Tahery. The judge also found that special measures, such as testifying behind a screen, would not allay his fears and allowed his written statement to be admitted as evidence.

T's witness statement was then read to the jury in his absence. Mr Tahery also gave evidence. The judge, in his summing up, warned the jury about the danger of relying on T's evidence, as it had not been tested under cross-examination.

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.

Mr Tahery appealed, arguing that his right to a fair trial had been infringed because he was not able to have T cross-examined. The Court of Appeal acknowledged that the prospect of a conviction would have receded – and that of an acquittal advanced – had T's evidence not been admitted. It found nevertheless that any unfairness had been prevented by the cross-examination of other prosecution witnesses, the evidence from Mr Tahery himself and the possibility he had of calling bystanders. Furthermore, the trial judge had given the jury explicit directions on how to treat the statement in question. Further leave to appeal was refused.

Complaints, procedure and composition of the Court

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

Mr Al-Khawaja lodged his application with the European Court of Human Rights on 18 July 2005 and Mr Tahery, on 23 May 2006. A Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 8 January 2008. In its Chamber judgment of 20 January 2009, the Court joined the cases and held unanimously that there had been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (d) concerning the decisions to allow statements from absent witnesses to be read at the applicants' trial.

On 1 March 2010 the case was referred under Article 43 (referral to the Grand Chamber) to the Grand Chamber at the request of the United Kingdom Government. A Grand Chamber hearing took place in public in the Human Rights Building, Strasbourg, on 19 May 2010.

The London-based non-governmental organisation JUSTICE submitted third-party comments.

Judgment was given by the Grand Chamber of 17, composed as follows:

Françoise **Tulkens** (Belgium), *President*,
 Nicolas **Bratza** (the United Kingdom),
 Jean-Paul **Costa** (France),
 Christos **Rozakis** (Greece),
 Peer **Lorenzen** (Denmark),
 Elisabet **Fura** (Sweden),
 Alvina **Gyulumyan** (Armenia),
 Danutė **Jočienė** (Lithuania),
 Dragoljub **Popović** (Serbia),
 Ineta **Ziemele** (Latvia),
 Mark **Villiger** (Liechtenstein),
 Giorgio **Malinverni** (Switzerland),
 András **Sajó** (Hungary),
 Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
 Işıl **Karakaş** (Turkey),
 Nebojša **Vučinić** (Montenegro),
 Kristina **Pardalos** (San Marino), *Judges*,

and also Michael **O'Boyle**, *Deputy Registrar*.

Decision of the Court

The Court held that Article 6 mainly requires it to assess the overall fairness of criminal proceedings. The right to examine a witness contained in Article 6 § 3(d) is based on the principle that, before an accused can be convicted, all the evidence must normally be produced in his/her presence at a public hearing so that it can be challenged. Two requirements follow from that principle. First, there has to be a good reason for non-attendance of a witness. Second, a conviction based solely or decisively on the statement of an absent witness is generally considered to be incompatible with the requirements of fairness under Article 6 ("the sole or decisive rule").

For the second requirement the Court took the same view as the British courts², and found that the sole or decisive rule should not be applied in an inflexible way, ignoring the specificities of the particular legal system concerned. To do so would transform the rule into a blunt and indiscriminate instrument that ran counter to the Court's traditional approach to the overall fairness of proceedings, namely to weigh in

² In May and December 2009 the Court of Appeal and the Supreme Court of the United Kingdom considered the Chamber's judgment on the present cases when dismissing the appeals of four defendants who had been convicted on the basis of statements of absent victims read at trial (*R. v. Horncastle and others*).

the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.

Therefore, the Court found that if a conviction is based solely or decisively on the statement of an absent witness, counterbalancing factors must be in place, including strong procedural safeguards. However, the conviction would not automatically result in a breach of Article 6 § 1.

The Court considered three issues in each case: first, whether it had been necessary to admit the witness statements of ST or T; second, whether their untested evidence had been the sole or decisive basis for each applicant's conviction; and third, whether there had been sufficient counterbalancing factors including strong procedural safeguards to ensure that each trial had been fair.

Al-Khawaja

It was not in dispute that ST's death had made it necessary to admit her statement, otherwise her evidence could not have been considered at all.

Furthermore, the judge who had admitted her statement had been quite clear about its significance ("no statement, no count one"). ST's statement had therefore been decisive. It had not, however, been the sole evidence, as her friends as well as the other complainant had corroborated her allegations. Indeed, in a case of indecent assault by a doctor on his patient during a private consultation, it would be difficult to imagine stronger corroborative evidence, especially when each of the other witnesses had been called to give evidence at trial and their reliability had been tested by cross-examination.

Lastly, it had to have been clear from the direction to the jury that ST's statement should carry less weight because they had not seen, heard or cross-examined her.

In conclusion, the judge's direction as well as the evidence offered by the prosecution had enabled the jury to conduct a fair and proper assessment of the reliability of ST's allegations against Mr Al-Khawaja. The Court therefore held (by 15 votes to two) that, notwithstanding the dangers of admitting the statement as evidence and the difficulties caused to the defence, there had been sufficient counterbalancing factors to conclude that there had been no breach of Article 6 § 1 in conjunction with Article 6 § 3 (d).

Tahery

T had been the only person who claimed to have seen the stabbing and his uncorroborated eyewitness statement had been, if not the sole, at least the decisive evidence against Mr Tahery. Without it, the chances of a conviction had been slim.

The Court found that neither the fact that Mr Tahery could challenge T's statement himself nor the trial judge's warning to the jury in his summing up sufficiently counterbalanced the difficulties caused to the defence by the admission of the untested evidence. Mr Tahery could not have T, the only witness willing to say what he had seen, cross-examined about the details of his statement or his motives for making it. Although the judge's warning was clearly and forcibly expressed, it was not sufficient to counterbalance the unfairness caused by allowing the untested statement of the only prosecution witness with the only direct evidence against Mr Tahery be read out in court.

The Court therefore concluded that there had not been sufficient counterbalancing factors to compensate for the difficulties caused to the defence by the admission of hearsay evidence and held unanimously that there had been a violation of Article 6 § 1 in conjunction with Article 6 § 3 (d).

Article 41 (just satisfaction)

The Court held that the United Kingdom was to pay Mr Tahery 6,000 euros (EUR) in respect of non-pecuniary damage, and EUR 12,000 for costs and expenses.

Separate opinions

Judge Bratza expressed a concurring opinion and Judges Sajó and Karakaş expressed a joint partly dissenting and partly concurring opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

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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.