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

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ECHR 376 (2014)
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Conclusion of judicial dialogue between ECHR and UK courts on use of hearsay evidence

In today's **Chamber** judgment[1] in the case of **Horncastle and Others v. the United Kingdom** (application no. 4184/10) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 §§ 1 and 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 four applicants' complaints that in admitting victims' written statements as evidence against them at their criminal trials the domestic courts had violated their right to have examined witnesses who gave sole or decisive evidence against them.

The Court reiterated the principles established in its Grand Chamber judgment in ***Al-Khawaja and Tahery v. the United Kingdom*** (application nos. 26766/05 and 22228/06) in which it had agreed with the domestic courts 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. Where hearsay evidence was sole or decisive, the question was whether there were adequate counterbalancing factors in place, including strong procedural safeguards, to compensate for the difficulties caused to the defence.

In relation to the first two applicants, the Court found that even assuming that the written statement of the victim had been "decisive", there had been sufficient safeguards in domestic law to protect their right to a fair trial. In relation to the second two applicants, the Court concluded that the statement had been neither the sole nor decisive basis of their conviction and, accordingly, that there had been no violation of their defence rights.

This judgment concludes the judicial dialogue on the admissibility of hearsay evidence in criminal trials which commenced with the delivery of this Court's Chamber judgment in *Al-Khawaja and Tahery*. The Supreme Court, when hearing the present applicants' appeal, examined that judgment and invited the Grand Chamber to accept a request to rehear the case. The subsequent Grand Chamber judgment in *Al-Khawaja and Tahery* agreed with the Supreme Court that the sole or decisive rule should not be applied in an inflexible way.

Principal facts

The applicants, Michael Christopher Horncastle, David Lee Blackmore, Abijah Marquis and Joseph David Graham, are British nationals who were born in 1980, 1981, 1978 and 1981 respectively. They are currently in detention.

In November 2007 Mr Horncastle and Mr Blackmore were convicted of causing grievous bodily harm with intent by a unanimous jury verdict. Their victim had given a written statement to the police identifying his attackers but had died before trial from an unrelated illness. The statement was admitted in evidence against the applicants.

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.

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On 12 May 2008 Mr Marquis and Mr Graham were convicted of kidnapping a woman from her home. During the kidnapping they had threatened to harm her. The victim and her husband initially made written statements to the police but later refused to appear as witnesses at trial because they were scared for the safety of their families. The victim's statement was admitted in evidence against the applicants but the judge refused to admit the statement of her husband.

The applicants appealed their convictions to the Court of Appeal but their appeals were rejected in May 2009. They then appealed to the Supreme Court which also rejected their appeals in December 2009.

Complaints, procedure and composition of the Court

Relying on Article 6 §§ 1 and 3 (d) (right to a fair trial and right to obtain attendance and examination of witnesses), the applicants complained that by admitting the victims' written statements at trial the domestic courts had violated their right to have examined witnesses who gave sole or decisive evidence against them.

The application was lodged with the European Court of Human Rights on 7 January 2010.

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

Ineta **Ziemele** (Latvia), *President*,
Päivi **Hirvelä** (Finland),
Ledi **Bianku** (Albania),
Nona **Tsotsoria** (Georgia),
Zdravka **Kalaydjieva** (Bulgaria),
Paul **Mahoney** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),

and also Françoise **Elens-Passos**, *Section Registrar.*

Decision of the Court

The Court noted that it had consistently underlined that the admissibility of evidence was primarily a matter for national law and courts to regulate. The Court's task was to ascertain whether the proceedings as a whole had been fair. It reiterated that Article 6 § 3 (d) enshrined the principle that all evidence against the accused had to be produced in their presence at a public hearing so that it could be challenged. In its Grand Chamber judgment in the case ***Al-Khawaja and Tahery v. the United Kingdom*** (application nos. 26766/05 and 22228/06) the Court had set out two requirements following on from that principle. First, there had 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 could be compatible with the right to a fair trial if there were sufficient counterbalancing factors, including the existence of strong procedural safeguards, to permit a fair and proper assessment of the evidence.

The applicants did not challenge the domestic law controlling admission of absent witness evidence, accepting that there were strong safeguards designed to ensure the fairness of criminal proceedings in the United Kingdom, but questioned whether these mechanisms had been properly applied in the decisions in their particular cases.

As explained in *Al-Khawaja and Tahery*, the questions for the Court in each case were: whether there had been a good reason for the witnesses' non-attendance; whether the witness statements had been "sole or decisive"; and, if so, whether there had nonetheless been adequate counterbalancing measures.

Mr Horncastle and Mr Blackmore

The Court accepted that the death of the victim had made it necessary to admit his statement if his testimony were to be considered.

The Court's starting point in determining whether the victim's statement had been decisive for the applicants' conviction was the judgments of the domestic courts. The trial judge said that the prosecution case depended on the victim's statement while the Court of Appeal accepted that the applicants' convictions had been based "to a decisive degree" on the statement. However, the Court considered it to be more than arguable that the strength of the other incriminating evidence in the case, in particular the admissions by the applicants that they had been present at the victim's flat on the night that he had been attacked, was such that the statement had not been decisive in the sense that it had determined the outcome of the case.

However, even assuming that the statement had been "decisive", the Court was satisfied that there had been sufficient counterbalancing factors to compensate for any difficulties caused by its admission, including the legislative framework regulating the circumstances in which hearsay evidence could be admitted and the possibility for the applicants to challenge its admission. The domestic law safeguards had been applied appropriately by the trial judge and, when taken in combination with the strength of the other prosecution evidence and the careful directions given by the trial judge, enabled the jury to fairly and properly assess the reliability of the victim's statement. Accordingly, there had been no violation of Article 6 §§ 1 and 3 (d) in respect of Mr Horncastle and Mr Blackmore.

Mr Marquis and Mr Graham

The Court was satisfied that there had been a good reason for the failure of the victim to attend trial to give evidence. The trial judge had made appropriate enquiries into the nature, extent and grounds of the victim's fear. The threats made to her during the kidnapping and the fact that she would risk imprisonment rather than testify had persuaded him that she was "petrified, genuinely in distress". All available steps had been taken to secure her attendance. The trial judge's refusal to admit the written statement of her husband, on the ground that the judge was not satisfied that his absence at trial was due to fear, demonstrated the care and diligence with which the judge had approached his task.

In assessing the sole or decisive nature of the statement, the Court began with the evaluation of the evidence by the domestic courts. Significantly, the Court of Appeal had not considered the evidence of the victim to be decisive. Other, independent evidence was available, including CCTV footage of Mr Graham outside the victim's home at the time of the kidnapping, undisputed telephone record data showing calls from Mr Marquis' phone to the victim's husband on the night of the kidnapping and evidence that the applicants had checked into a hotel on the night of the kidnapping with the car they had stolen from their victim.

The Court therefore concluded that the victim's statement had not been the sole or decisive basis for the applicants' convictions. It was therefore unnecessary to examine whether there had been sufficient counterbalancing factors.

There had, accordingly, been no violation of Article 6 §§ 1 and 3 (d) in respect of Mr Marquis and Mr Graham.

The judgment is available only in English.

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Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Céline Menu-Lange (tel: + 33 3 90 21 58 77)
Nina Salomon (tel: + 33 3 90 21 49 79)
Denis Lambert (tel: + 33 3 90 21 41 09)

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.