

Court: European Court of Human Rights

Case: Al-Khawaja and Tahery v. The United Kingdom

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### Abstract

Mr. Imad Al-Khawaja, a British national, (“First Applicant”) alleged that allowing a complainant’s statement to be read to the jury made his trial unfair. Mr. Ali Tahery, an Iranian national, (“Second Applicant”) also alleged that his trial was unfair because the statement of the key witness was read to the jury. They each lodged a complaint under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) for violation of Article 6 § 1 read in conjunction with Article 6 § 3(d).

### Facts

#### *The Case of Mr. Al-Khawaja*

First Applicant was charged with two counts of indecent assault on two female patients while working as a consultant physician in the field of rehabilitative medicine. The first count alleged that he had indecently assaulted a woman, ST, during a consultation on June 3, 2003 while she was under hypnosis. The second count alleged that he had indecently assaulted a woman, VU, also during a consultation while under hypnosis on June 12, 2003. ST committed suicide before the trial for reasons unrelated to the alleged assault. She had made a statement to the police several months after the alleged assault. She had also told two friends, BF and SH, about the incident.

#### *The Case of Mr. Tahery*

On May 19, 2004, S, was involved in an altercation in which Second Applicant interposed himself. In the early morning hours of May 20, 2004, S and the Second Applicant met again and began discussing the earlier altercation. During this discussion, they began fighting and Second Applicant pushed S. S became aware of a burning sensation in his back where he had been stabbed three times. However, S did not witness Second Applicant stab him, go behind him, or reach behind him. No one at the scene claimed to have witnessed such an event. However, two days later, T made a statement to the police that he had seen Second Applicant stab S.

### Background:

#### *The Case of Mr. Al-Khawaja*

On March 22, 2004 at a preliminary hearing, a judge determined ST’s statement could be read to the jury because it would not be difficult for First Applicant to rebut the statement since he had to defend against VU’s allegation as well. The judge additionally noted ST’s statement was crucial to the prosecution’s case.

At trial, the following evidence was introduced: a reading of ST's statement; evidence from ST's friends, BF and SH; and evidence from VU. The judge directed the jury to "bear in mind when considering her [ST's] evidence that you have not seen her give evidence; you have not heard her give evidence; and you have not heard her evidence tested in cross-examination." He also instructed the jury to consider the evidence of VU, and of the other two women who gave evidence, when deciding if ST's statement was true. He explained that no collusion between ST and VU was alleged.

First Applicant was convicted unanimously on both counts. He appealed to the Court of Appeal claiming submission of ST's statement was wrong and the trial judge's directions to the jury did not adequately convey the disadvantage the defense faced. The appeal was heard and dismissed on September 6, 2005, finding no infringement on First Applicant's right to a fair trial. The Court of Appeal refused appeal to the House of Lords but certified a "point of law of general public importance" upon which First Applicant petitioned the House of Lords. This was refused on February 7, 2005.

#### *The Case of Mr. Tahery*

Second Applicant pled guilty to one charge of attempting to pervert the course of justice but maintained innocence as to wounding with intent. S gave evidence to the prosecution. Pursuant to Section 114(2)(e) and (4) of the Criminal Justice Act 2003 ("2003 Act"), T was too fearful to attend trial, so his statement was read to the jury. The trial judge warned the jury: "ask yourselves 'is the statement he made reliable.'" The judge made clear that T's fear was not from any threat or action made by Second Applicant or anyone on his behalf. On April 29, 2005, Second Applicant was convicted. He then appealed to the Court of Appeal arguing that his inability to cross-examine T infringed upon his right to a fair trial. This was refused on January 24, 2006, but he was given leave to reduce his sentence.

#### Complaint:

Mr. Al-Khawaja and Mr. Tahey applied to the European Court of Human Rights against the United Kingdom of Great Britain and Northern Ireland ("the Government"). They claimed that their inability to cross-examine the witnesses resulted in an unfair trial and violated Article 6 § 1 and 3(d) of the Convention, which reads:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

3. Everyone charged with a criminal offense has the following minimum rights:

...

(d) to examine or have examined the witnesses against him and to obtain the attendance and examination of

witnesses on his behalf under the same conditions as witnesses against him.

### **The Court's Analysis:**

#### **The Chamber:**

The Fourth Section of the European Court of Human Rights, sitting in Chamber on January 20, 2009, examined the matter on the basis that each conviction was based solely, or to a decisive degree, on the two witnesses concerned. It considered the counterbalancing factors that the Government relied on in each case and found the trial judge's determination and the Court of Appeal's review were not compatible with Article 6 §1 and 3(d) of the Convention.

#### *The Case of Mr. Al-Khawaja*

The Chamber found that the counterbalancing factors the Government relied on were not sufficient to outweigh the prejudice to the defense caused by ST's unexamined statement. In particular, the fact that ST's statement alone did not compel the applicant to give evidence; that there was no suggestion of collusion between ST and VU; that there were inconsistencies between ST's statement and what was said by BF and SH; that ST's credibility could be challenged; and that the judge warned the jury were not enough to make the trial fair.

#### *The Case of Mr. Tahery*

The Chamber found that the counterbalancing factors relied on by the Government could not have ensured a fair trial nor overcome the prejudice created by reading T's statement to the jury. None of the counterbalancing factors were enough to avoid a violation of Article 6 §1 and 3(d) of the Convention. The factors included the alternative measures to T's absent witness testimony, the Second Applicant's ability to challenge or rebut the statement by giving evidence himself or calling other witnesses, the trial judge's warning to the jury regarding the reliability of the testimony, and the clarification that the Second Applicant was not the source of T's fear.

The Government appealed the Fourth Section of the Chamber's decision arguing that there was a violation of Article 6 § 1 and 3(d) in both Mr. Tahery and Al-Khawaja's cases. It stated that their domestic law and practice safeguarded against the unfairness claimed by both applicants. The Government claimed that (1) both witnesses' inability to be present at trial were justifiable; (2) neither statement was sole or decisive; and (3) the trial judge's direction and Court of Appeal admission were sufficient safeguards against unfair conviction of the defendants based on hearsay evidence.

#### **The Grand Chamber**

The Grand Chamber considered three issues in each case to determine if there was a violation of Article 6 § 1 and 3(d) of the Convention: (1) whether it was necessary to admit the witness statements of ST or T; (2) whether their

untested evidence was the sole or decisive basis for each applicant's conviction; and (3) whether there were sufficient counterbalancing factors to ensure that each trial, judged as a whole, was fair within the meaning of the Convention.

*The Case of Mr. Al-Khawaja Rulings:*

- (1) ST's death made it necessary to admit her statement if evidence to her complaint was to be considered.
- (2) ST's statement was decisive as determined by the trial judge at the preliminary hearing, but it was in the interest of justice to admit ST's statement, which the police properly recorded. The minor inconsistencies between ST's statement and that relayed by her friends, BF and SH, were not enough to determine her statement to be unfair in its admission. The similarity of ST's statement and VU's statement gave further evidence of its reliability.
- (3) Taken as a whole, the Court concluded the jury was able to conduct a fair and proper assessment of the reliability of ST's statement; the counterbalancing factors of the trial judge's warning and the Court of Appeal were sufficient.

Thus, there was no violation of Article 6 § 1 or 3(d) in the case of Mr. Al-Khawaja.

*The Case of Mr. Tahey Rulings:*

The Grand Chamber ruled the following in the case of Mr. Tahey:

- (1) The conclusion of the trial judge that T had a genuine fear of giving oral evidence and special measures were not sufficient justification for admitting T's statement as read to the jury.
- (2) T's testimony was uncorroborated and he was the only eyewitness that claimed to see the stabbing. His statement was decisive evidence against the applicant, if not the sole evidence. Without it, there would have been very little chance of conviction.
- (3) The counterbalancing factors of the trial judge's conclusion that admission of T's statement was fair and the warning given by the trial judge to the jury were not enough to counterbalance the handicap of the defense. T's evidence was singular, circumstantial, and uncorroborated. No amount of warning by the judge could make up for the untested statement by T.

As a result there was a violation of Article 6 § 1 and 3(d) in Mr. Tahey's case.