FOURTH SECTION

CASES OF AL-KHAWAJA AND TAHERY
v. THE UNITED KINGDOM

(Application nos. 26766/05 and 22228/06)

JUDGMENT

STRASBOURG

20 January 2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Al-Khawaja and Tahery v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Nicolas Bratza,
Giovanni Bonello,
Kristaq Traja,
Ljiljana Mijović,
Ján Šikuta,
Päivi Hirvelä, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 16 December 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The cases originated in two application (nos. 26766/05 and 2228/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Imad Al-Khawaja ("the first applicant"), on 18 July 2005 and by an Iranian national, Mr Ali Tahery ("the second applicant"), on 23 May 2006.

2. The first applicant was represented by Mr A. Burcombe, a lawyer practising in London with Hayes Burcombe & Co. Solicitors, assisted by Mr J. Bennathan Q.C., counsel. The second applicant was represented by Mr P. Kandler, a lawyer practising in London with Peter Kandler & Co. Solicitors, assisted by Ms R. Trowler, counsel. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.

3. The first applicant alleged that his trial for indecent assault had been unfair because one of the two women who made complaints against him died before the trial and her statement to the police was read to the jury. The second applicant alleged that his trial for wounding with intent to do grievous bodily harm had been unfair because the statement of one witness who feared attending trial was read to the jury.

4. On 5 September 2006 the President of the Chamber within the Section to which the cases had been allocated decided to give notice of each application to the Government. It was also decided to examine the merits of each application at the same time as its admissibility (Article 29 § 3).

5. The applicants and the Government each filed written observations (Rule 59 § 1).

6. A hearing in both cases took place in public in the Human Rights Building, Strasbourg, on 8 January 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. GRAINGER, *Agent*,
Mr D. PERRY QC, *Counsel*,
Ms L. CLAPINSKA,
Mr S. JONES,
Mr M. LINDLEY,
Ms A. SHARIF, *Advisers*;

(b) *for the applicant*

Mr J. BENNATHAN QC, *Counsel for Mr Al-Khawaja*,
Ms R. TROWLER, *Counsel for Mr Tahery*.

The Court heard addresses by Mr Bennathan and Mr Perry and their answers to a question put by Judge Bratza.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASES

A. Mr Al-Khawaja

7. The applicant was born in 1956 and lives in Brighton.

8. While working as a consultant physician in the field of rehabilitative medicine, the applicant 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, several months after the alleged assault, had made a statement to the police.

9. On 22 March 2004, a preliminary hearing was held to determine whether S.T.'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 took place; “putting it bluntly, no statement, no count one.” The defence accepted that if the statement was read to the jury at trial they would be in a position to rebut it through the cross-examination of other witnesses and expose inconsistencies in their evidence. The judge considered that this represented a route by which S.T.'s

statement and/or her credibility could be challenged; however, he went on to underline the importance of the need for the trial judge to give directions to the jury as to the status of the evidence. The judge allowed the evidence to be admitted at trial.

10. The jury heard evidence from a number of different witnesses and the defence were given the opportunity to cross-examine other witnesses who had produced similar fact evidence, including the second complainant who had produced supportive evidence. In his summing up, the trial judge directed the members of the jury, on two separate occasions, as to how they should regard the read statement of the deceased complainant. The judge stated in his summing up:

> "It is very important that you [the jury] bear in mind when considering her [S.T.'s] evidence that you have not seen her give evidence; you have not heard her give evidence; and you have not heard her evidence cross-examined [by applicant's counsel], who would undoubtedly have had a number of questions to put to her."

11. The judge later stated:

> "...bear in mind...that this evidence was read to you. The allegation is completely denied...you must take that into account when considering her evidence."

On three occasions the jury asked for clarification of points raised in the read statement of S.T.

12. The applicant 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.

13. The applicant appealed against his conviction to the Court of Appeal. The appeal centred on the pre-trial ruling to admit S.T.'s statement as evidence. It was also submitted that, in his summing up, the trial judge did not give adequate directions to the jury as to the consequential disadvantage of this evidence to the applicant.

14. On 6 September 2005 the appeal was dismissed. The Court of Appeal concluded on 3 November 2005 that the applicant's right to a fair trial had not been infringed. With regard to the admission in evidence of the statement of the deceased complainant, the court held that it was not necessarily incompatible with Article 6 §§ 1 and 3 (d). Relying on *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports of Judgments and Decisions* 1996-II p 66, the court held that admissibility of evidence is primarily a matter of domestic law. It then found:

> "Where a witness who is the sole witness of a crime has made a statement to be used in its prosecution and has since died, there may be a strong public interest in the admission of the statement in evidence so that the prosecution may proceed. That was the case here. That public interest must not be allowed to override the requirement that the defendant have a fair trial. Like the court in *Sellick* [see relevant domestic law below] we do not consider that the case law of the European Court of Human Rights requires the conclusion that in such circumstances the trial will be unfair. The

> provision in Article 6(3)(d) that a person charged shall be able to [have] the witnesses against him examined is one specific aspect of a fair trial: but if the opportunity is not provided, the question is 'whether the proceedings as a whole, including the way the evidence was taken, were fair' – *Doorson*, paragraph 19. This was not a case where the witness had absented himself, whether through fear or otherwise, or had required anonymity, or had exercised a right to keep silent. The reason was death, which has a finality which brings in considerations of its own, as has been indicated at the start of this paragraph."

15. The court also considered that the applicant had been able to attack the accuracy of the deceased complainant's statement by exploring the inconsistencies between it and the evidence given by witnesses and experts. Turning to the issue of the trial judge's summing up, the court stated:

> "We consider that it would have been better if the judge had stated explicitly that the appellant was potentially disadvantaged by the absence of [S.T.] and that in consequence of the inability to cross-examine her and of the jury to see her, her evidence should carry less weight with them. Nonetheless, in the circumstances of this case it must have been wholly clear to the jury from the directions the judge did give, that this was the purpose of his remarks. We therefore consider that the jury were given an adequate direction as to the consequences of [S.T.'s] statement being in evidence in her absence, and that this is not a factor which might make the appellant's trial unfair and in breach of Article 6. We should also say that overall the evidence against the appellant was very strong. We were wholly unpersuaded that the verdicts were unsafe."

16. The Court of Appeal refused leave to appeal to the House of Lords but certified that a point of law of general public importance was involved in the decision.

17. On 30 November 2005 the applicant petitioned the House of Lords on the point of law certified by the Court of Appeal. On 7 February 2005 the House of Lords refused the petition.

B. Mr Tahery

18. The applicant was born in 1975. On 19 May 2004 he was involved in a fight with S. during which it is alleged that the applicant stabbed S. three times in the back. The applicant was charged with wounding with intent and also with 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. Both S. and T. were members of the Iranian community in London.

19. On 25 April 2006 the applicant's trial began at Blackfriars Crown Court. On 26 April (the second day of trial) the prosecution made an application for leave to read T.'s statement pursuant to section 116(2) (e) and (4) of the Criminal Justice Act 2003 (the "CJA 2003"). The prosecution

argued under the CJA 2003 that T. was too fearful to attend trial before the jury and that he should qualify for special measures. The trial judge heard evidence from a police officer conducting the case who testified that the Iranian community was close-knit and that T.'s fear was genuine. The trial judge also heard evidence from T. himself who gave evidence to the judge from behind a screen. In ruling that leave should be given for the statement to be read to the jury, the trial judge stated:

> "I am satisfied in those circumstances upon the criminal standard of proof that this witness is genuinely in fear; and I base that not only on his oral testimony, but also upon my opportunity while he was in the witness box to observe him. I therefore have to look, having looked at the contents of the statement, to any risk its admission or exclusion will result in unfairness to any party to the proceedings. I am satisfied that there would be an unfairness caused by its exclusion; but I am equally satisfied that no unfairness would be caused by its admission. And in doing so, I have taken into account the words of the statute [Section 116 (2)(e) of the Criminal Justice Act 2003, see relevant domestic law below]; in particular how difficult it will be to challenge the statement if the relevant person does not give oral evidence. Challenge of a statement does not always come from cross-examination. Challenge of a statement can be caused by evidence given in rebuttal; by either the defendant, if he chooses to do so, or by any other bystander – and we know that there were some – who were on the street at that time. Consequently I am satisfied that the defendant's evidence, if he chooses to give it, would be sufficient to rebut and to challenge the evidence that is contained in that statement. I have further considered other relevant factors, and I have also offered to the witness whilst he was in the witness box behind screens the possibility of him giving evidence with the same special measures in place. He told me his position would not change; that he could not give evidence before a jury, and the reason that he could not was because he was in fear. Having taken all those matters into account in those circumstances, I am satisfied that this is the type of case which Parliament envisaged might require a statement to be read."

20. 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 the evidence of T. He stated:

> "That evidence, as you know, was read to you under the provisions that allow a witness who is frightened, it is not a question of nerves it is a question of fright, fear, for his statement to be read to you but you must be careful as to how you treat it. It is right, as has been pointed out by the defence, that they were deprived of an opportunity to test that evidence under cross-examination. It is right also that you did not have the advantage of seeing the witness and his demeanour in Court...You must ask yourselves 'can we rely upon this statement? Is it a statement which we find convincing?' It is only if you are satisfied so that you are sure that what is in the statement has accurately depicted what happened that night and what the witness saw, that you could rely upon it. That goes for any witness. It is only if you find that the evidence is compelling and satisfies you so that you are sure that you act upon it. So you must always ask yourselves 'is the statement he made reliable?' You must bear in mind also, importantly, that it is agreed and acknowledged that it is not the defendant who is responsible for putting the witness in fear."

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 nine years' imprisonment to be served concurrently with a term of fifteen months' imprisonment for doing an act intended to pervert the course of justice.

21. The applicant's appeal was referred directly before the full Court of Appeal. The applicant argued that the inability to cross-examine T. infringed his right to a fair trial. The appeal judges were satisfied that if they were to refuse leave, under the CJA 2003, to have T.'s statement read at trial there would be unfairness to the prosecution and that, were they to grant it, there would be no unfairness to the applicant. The Court of Appeal acknowledged, however, that the Crown accepted that T.'s statement was "both important and probative of a major issue in the case...and had it not been admitted the prospect of a conviction would have receded and that of an acquittal advanced." The court upheld the reasoning at first instance, stating that there was available not only cross-examination of other prosecution witnesses but also evidence from the applicant himself and the potential for evidence from other bystanders in order to prevent unfairness. It was also stated that the trial judge had explicitly warned the jury in detail as to how they should treat this evidence and properly directed them as to how they should consider it in reaching their verdict. Although the applicant maintained that even a proper direction by the judge could not cure the unfairness, the Court of Appeal held that the jury was informed of all matters necessary to its decision-making process. The applicant's sentence was reduced to seven years' imprisonment.

Leave to appeal on conviction was refused on 24 January 2006.

II. RELEVANT DOMESTIC LAW

A. Primary legislation applicable to *Al-Khawaja*

22. At the time of the trial judge's ruling and the trial in Mr Al-Khawaja's case, the relevant statutory provisions were to be found in sections 23 to 28 of the Criminal Justice Act 1988. Section 23 of the 1988 Act provides for the admission of first hand documentary hearsay in a criminal trial:

> "**23.**—...statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if—
>
> (2)(a) the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness...
>
> **25.**—(1) If, having regard to all the circumstances—
>
> (a) the Crown Court—

(i) on a trial on indictment;

(ii) on an appeal from a magistrates' court; or

(iii) on the hearing of an application under section 6 of the [1987 c. 38.] Criminal Justice Act 1987 (applications for dismissal of charges of fraud transferred from magistrates' court to Crown Court); or

(b) the criminal division of the Court of Appeal; or

(c) a magistrates' court on a trial of an information,

is of the opinion that in the interests of justice a statement which is admissible by virtue of section 23 or 24 above nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of subsection (1) above, it shall be the duty of the court to have regard—

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to be relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;

(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and

(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them."

B. Primary legislation applicable to *Tahery*

23. The following legislative provisions of the Criminal Justice Act 2003 were drafted as a means to tackle crime by providing special measures to protect witnesses who have a genuine fear of intimidation and repercussions. The Act entered into force in April 2005.

24. Section 116 (2)(e) of the Criminal Justice Act 2003 (cases where a witness is unavailable) states that:

"In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if...fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

Section 116 (4) states:

"Leave may be given under subsection (2)(e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard-

(a) to the statement's contents,

(b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence) ...

(d) to any other relevant circumstances."

C. *R v. Sellick and Sellick*

25. This Court's judgment in *Lucà v. Italy*, no. 33354/96, § 40, ECHR 2001-II was considered by the Court of Appeal in *R. v. Sellick and Sellick* [2005] EWCA Crim 651, which concerned two defendants who were alleged to have intimidated witnesses. Leave was given by the trial judge to have the witnesses' statements read to the jury. The defendants appealed on the ground that the admission of the statements breached Article 6 § 1 read with 3 (d) of the Convention. The Court of Appeal dismissed the appeal. In considering the relevant case-law of this Court, at paragraph 50 of its judgment, it stated that what appeared from that case-law were the following propositions:

"i) The admissibility of evidence is primarily for the national law;

ii) Evidence must normally be produced at a public hearing and as a general rule Article 6(1) and (3)(d) require a defendant to be given a proper and adequate opportunity to challenge and question witnesses;

iii) It is not necessarily incompatible with Article 6(1) and (3)(d) for depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held. The reasons for the court holding it necessary that statements should be read and the procedures to counterbalance any handicap to the defence will all be relevant to the issue, whether, where statements have been read, the trial was fair.

iv) The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to reliance on it, will also be relevant to the question whether the trial was fair."

The Court of Appeal then stated:

"The question is whether there is a fifth proposition to the effect that where the circumstances justify the reading of the statement where the defendant has had no opportunity to question the witness at any stage of the trial process, the statement must not be allowed to be read if it is the sole or decisive evidence against the defendant. Certainly at first sight paragraph 40 of *Luca* seems to suggest that in whatever circumstances and whatever counterbalancing factors are present if statements are read then there will be a breach of Article 6, if the statements are the

sole or decisive evidence. Furthermore there is some support for that position in the previous authorities. But neither *Luca* nor any of the other authorities were concerned with a case where a witness, whose identity was well-known to a defendant, was being kept away by fear, although we must accept that the reference to Mafia-type organisations and the trials thereof in paragraph 40 shows that the court had extreme circumstances in mind."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

A. The parties' submissions

1. The applicants

26. The first applicant, Mr Al-Khawaja, complained that the trial judge's decision to allow the statement of S.T. to be read at trial meant he was denied the opportunity to examine or have examined a witness against him, whose evidence was the sole or decisive evidence in respect of one of his convictions. The second applicant, Mr Tahery, made the same complaint in respect of the decision to allow the statement of T. to be read at trial. Each applicant complained that these decisions amounted to a violation of his right to a fair trial under Article 6 §§ 1 and 3 (d) of the Convention, which reads as follows:

"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 offence has the following minimum rights:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"

27. The applicants relied principally on *Lucà*, cited above, and submitted that the settled case-law of this Court was that a conviction basely solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or have examined is incompatible with Article 6 of the Convention. That test had been

confirmed in *Visser v. the Netherlands*, no. 26668/95, 14 February 2002; *P.S. v. Germany*, no. 33900/96, 20 December 2001, and *Krasniki v. the Czech Republic*, no. 51277/99, 28 February 2006. Applying the *Lucà* to the facts of each of the present cases there were clear breaches of Article 6 since in each case there was one central witness and it was beyond dispute that this witness was at least decisive in each case. While an exception might apply to cases such as *Sellick* (see paragraph 25 above), where the defendant was responsible for the witnesses' non-attendance at trial, this was not the case for either of the present cases where the applicants were not responsible for the absence of the witnesses. In the present cases, the Court of Appeal had failed to apply fully this Court's ruling in *Lucà*. The procedural safeguards in the relevant legislation were capable of ensuring the right to a fair trial as long as their implementation gave due regard to the clear principles contained in Article 6 § 3(d) and *Lucà*.

28. Furthermore, the procedures relied on by the Government (see below) fell far short of meeting the handicap to each applicant. The statutory regimes in place and each trial judges' conclusion that it was in the interests of justice to admit the statements were in issue before this Court in each case. Moreover, the "interests of justice" test had to be applied in accordance with Article 6. Neither applicant had been able to challenge the credibility of the relevant witness with respect to the truth of the central allegation each witness had made. No warning to the juries could compensate for the loss of opportunity of seeing and hearing the witnesses. In Tahery, the applicant could not have called other witnesses to the incident for the same reason that T. did not appear: the close knit nature of the Iranian community.

2. The Government

29. The Government contested that argument. In the case of Mr Tahery, though they were content to approach the issues arising in this case on the basis that the evidence was decisive, they qualified this by relying on the Court of Appeal's conclusions that there was no unfairness in the admission of T.'s statement, that there was no reason to doubt the safety of the conviction, and that the other evidence in the case was compelling. The Government also noted that it was very difficult to say exactly when evidence is decisive, not least because in England and Wales juries did not give reasons for their verdicts. In respect of Mr Al-Khawaja, the Government noted that the impugned evidence was crucial to the prosecution's case on count one. However, referring to the fact that there had also been a conviction on count two, they further noted that the Court of Appeal had commented that, overall, the evidence against the applicant was very strong. The Court of Appeal had ruled out the possibility of collusion between the complainants and the prosecution was able to rely on the similar evidence of other women.

30. The proceedings in each case, considered as a whole, were fair. Relying on *S.N. v. Sweden*, no. 34209/96, ECHR 2002-V, the Government argued there was no absolute rule that a conviction could not be based solely or to a decisive extent on evidence given by an absent or anonymous witness. It could often be impossible to determine whether a conviction had in fact been based to a sole or decisive extent on such testimony. Such a rule could lead to the intimidation of witnesses or other anomalous results. The legislation in question provided sufficient procedural safeguards so as to prevent a violation of Article 6. Many of the cases against other Contracting States where the Court had found a violation of Article 6 § 1 read with Article 6 § 3 (d) would not have arisen in England and Wales because witnesses had to be identified to the trial court. For example, the witness in *Lucà*who chose to exercise his statutory right to remain silent and whose earlier statement was then adduced in evidence did not fall within one of categories of witness in English law whose statement could be read in evidence.

31. In Mr Al-Khawaja's case they further relied on the fact that the trial judge had properly applied the relevant legislation and in particular concluded that it was in the interests of justice for the evidence to be admitted; that the admission of S.T.'s statement did not on its own compel the applicant to give evidence; and that there was no suggestion of collusion between the different complainants. They also relied on the fact that the trial judge had noted that inconsistencies between S.T.'s statement and those of other witnesses could be explored in cross examination of those other witnesses. The defence could challenge S.T.'s credibility and adduce appropriate expert evidence to that effect. The jury had been given a careful and accurate direction on the correct approach to evaluating S.T.'s statement and the conviction had been reviewed by the Court of Appeal.

32. In Mr Tahery's case the Government also relied on the fact that the trial judge had concluded that no unfairness would be caused by the admission of T.'s statement and that it was in the interests of justice to do so. He had also considered what alternative measures might have been taken to enable T. to give evidence. The applicant was in a position to challenge or rebut the statement by giving evidence himself (if he chose to do so) and by calling other witnesses who were present at the scene of the incident (one of whom was the applicant's uncle). He had also warned the jury that it was necessary to approach the evidence given by the absent witness with care because the defendant had been deprived of an opportunity to test it and because they, the jury, had not had the advantage of seeing the witness and his demeanour in court. The jury had been informed that it was not the applicant who had been responsible for T.'s fear. Finally, the Court of Appeal had also reviewed the applicant's conviction.

A. Admissibility of each application

33. The Court notes that the neither application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that neither application is inadmissible on any other grounds. Each application must therefore be declared admissible.

B. Merits

1. General principles applicable to both cases

34. Article 6 § 3(d) is an aspect of the right to fair trial guaranteed by Article 6 § 1, which, in principle, requires that all evidence must be produced in the presence of the accused in a public hearing with a view to adversarial argument (*Krasniki v. the Czech Republic*, no. 51277/99, § 75, 28 February 2006). As with the other elements of Article 6 § 3, it is one of the minimum rights which must be accorded to anyone who is charged with a criminal offence. As minimum rights, the provisions of Article 6 § 3 constitute express guarantees and cannot be read, as it was by the Court of Appeal in *Sellick* (see paragraph 25 above), as illustrations of matters to be taken into account when considering whether a fair trial has been held (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, §§ 67 and 68, Series A no. 146; *Kostovski v. the Netherlands*, 20 November 1989, § 39, Series A no. 166). Equally, even where those minimum rights have been respected, the general right to a fair trial guaranteed by Article 6 § 1 requires that the Court ascertain whether the proceedings as a whole were fair. Hence, in *Unterpertinger v. Austria*, 24 November 1986, Series A no. 110 the Court held that the reading out of statements of witnesses without the witness being heard in a public hearing could not be regarded as being inconsistent with Article 6 §§ 1 and 3(d) of the Convention but it went on to emphasise that the use made of this in evidence had nevertheless to comply with the rights of the defence which it was the object and purpose of Article 6 to protect. This meant that, in principle, the accused had to be given a proper and adequate opportunity to challenge and question a witness against him either when the witness made the statement or at a later stage.

35. In the Court's case-law, the question whether there has been compliance with Article 6 §§ 1 and 3(d) has arisen primarily in two different contexts. The first concerns the case of so-called “anonymous witnesses”, in which the identity of a witness is concealed in order, for instance, to protect him or her from intimidation or threats of reprisals or to preserve the anonymity of an undercover agent or informer (see, for example, *Krasniki*, cited above). The other concerns cases of “absent witnesses”, where the identity of a witness may be disclosed but where use is made in evidence of the statement of the witness who does not appear

before the court to give evidence in person because he or she has died, cannot be traced or refuses to appear out of fear or for some other reason (see, for example, *Craxi v. Italy (no. 1)*, no. 34896/97, 5 December 2002; *Ferrantelli and Santangelo v. Italy*, 7 August 1996, *Reports*1996-III; *Zentar v. France*, no. 17902/02, 13 April 2006; and *S.N.*, cited above). These categories are not mutually exclusive, since witnesses may be both anonymous and absent (see for example, *Lüdi v. Switzerland*, 15 June 1992, Series A no. 238; and *Van Mechelen and Others v. the Netherlands*, 23 April 1997, *Reports* -III).

36. Whatever the reason for the defendant's inability to examine a witness, whether absence, anonymity or both, the starting point for the Court's assessment of whether there is a breach of Article 6 §§ 1 and 3(d) is set out in *Lucà*, cited above, at § 40:

> "If the defendant has been given an adequate and proper opportunity to challenge the depositions either when made or at a later stage, their admission in evidence will not in itself contravene Article 6 §§ 1 and 3(d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6 [references omitted]."

37. The Court notes that in the present cases the Government, relying on the Court of Appeal's judgment in *Sellick* (see paragraph 25 above), argue that this Court's statement in *Lucà* and in other similar cases is not to be read as laying down an absolute rule, prohibiting the use of statements if they are the sole or decisive evidence, whatever counterbalancing factors might be present. However, the Court observes that the Court of Appeal in *Sellick* was concerned with identified witnesses and the trial judge allowed their statements to be read to the jury because he was satisfied that they were being kept from giving evidence through fear induced by the defendants. That is not the case in either of the present applications and, in the absence of such special circumstances, the Court doubts whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant. While it is true that the Court has often examined whether the procedures followed in the domestic courts were such as to counterbalance the difficulties caused to the defence, this has been principally in cases of anonymous witnesses whose evidence has not been regarded as decisive and who have been subjected to an examination in some form or other. This occurred in *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* -II, where the applicant was convicted of drug trafficking on the basis of statements by anonymous witnesses and a witness who attended trial but then absconded. The anonymous witnesses were ultimately questioned at the appeal stage, in the presence of the applicant's

lawyer, but not the applicant, and without the identity of the witnesses being revealed to applicant's lawyer. The Court found no violation. It was satisfied that no violation of Article 6 § 1 taken together with Article 6 § 3 (d) of the Convention could be found if it was "established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities" (§ 72 of the judgment). However, the Court also recalled at paragraph 76:

> "Even when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements."

38. The Government further relied on the case of *S.N.*, cited above, as confirming that there is no absolute rule prohibiting the use of untested statements. However, the Court does not consider that case to be of assistance to either of the present cases, confined as it was to its specific facts. It involved the suspected sexual abuse of a 10 year-old boy who was twice interviewed by the police, a video-recording being made of the first interview and an audio-recording of the second. The Court accepted that the boy's statements were virtually the only evidence on which the applicant's conviction was based. But, in finding that there had been no violation of Article 6, the Court placed reliance on a number of features of the case: in particular, the second interview had taken place at the request of the applicant's lawyer who consented to not being present and accepted the manner in which the interview was conducted; he did not request any postponement or ask for the interview to be recorded on video; and he was able to put any question to the boy through the police officer and had confirmed that the issues which he had wished to raise had been covered. The Court does not therefore regard the *S.N.* case as authority for any general proposition that untested statements can be admitted consistently with Article 6 when they are the sole or decisive evidence against a defendant.

2. The Court's approach to the present cases

39. The Court notes in the present cases that both parties were content to approach the matter on the basis that each conviction was based solely or to a decisive degree on the two witnesses concerned. It further notes that the Government have sought to qualify their position somewhat. In *Tahery* they maintained that in the jury system it was impossible to determine what evidence had been decisive for a conviction and relied on the Court of Appeal's findings that there was no reason to doubt the safety of the conviction and that the other evidence in the case was compelling. In *Al-Khawaja*, they relied on the fact that the Court of Appeal had commented that, overall, the evidence against the applicant was very strong, that it had ruled out the possibility of collusion between the complainants and that it

had found that the prosecution was able to rely on the similar evidence of other women. However, the Court cannot overlook the finding of the trial judge in *Al-Khawaja* that "no statement, no count one". Nor can it overlook the finding of the Court of Appeal in *Tahery* that T.'s statement was "both important and probative of a major issue in the case. Had it not been admitted the prospect of a conviction would have receded and that of an acquittal advanced." Having regard to each of these findings, the Court too will proceed on the basis that S.T.'s statement in *Al-Khawaja* and T.'s statement in *Tahery* were the sole or, at least, the decisive basis for each applicant's conviction.

40. The Court also notes that in addition to relying on a number of counterbalancing factors which are particular to each case, the Government also rely on several counterbalancing factors, which are common to the two cases, in particular that the trial judges correctly applied the relevant statutory tests and concluded that it was in the interest of justice to admit the statements and also that the Court of Appeal reviewed the safety of each conviction. The Court finds these particular factors to be of limited weight since the very issue in each case is whether the trial judges and the Court of Appeal acted compatibly with Article 6 §§ 1 and 3 (d) of the Convention and correctly applied the relevant case-law of this Court. On the basis of these observations, and on the basis of the general principles set out at paragraphs 34–38 above, the Court will now examine the remaining counterbalancing factors relied on by the Government in each case.

3. Al-Khawaja's case

41. In examining the facts of Mr Al-Khawaja's case, the Court observes that the counterbalancing factors relied by the Government are the fact that S.T.'s statement alone did not compel the applicant to give evidence; that there was no suggestion of collusion between the complainants; that there were inconsistencies between S.T.'s statement and what was said by other witnesses which could have been explored in cross-examination of those witnesses; the fact that her credibility could be challenged by the defence; and the warning to the jury to bear in mind that they had neither seen nor heard S.T.'s evidence and that it had not been tested in cross-examination.

42. Having considered these factors, the Court does not find that any of them, taken alone or together, could counterbalance the prejudice to the defence by admitting S.T.'s statement. It is correct that even without S.T.'s statement, the applicant may have had to give evidence as part of his defence to the other count, count two. But had S.T.'s statement not been admitted, it is likely that the applicant would only have been tried on count two and would only have had to give evidence in respect of that count. In respect of the inconsistencies between the statement of S.T. and her account as given to two witnesses, the Court finds these were minor in nature. Only one such inconsistency was ever relied on by the defence, namely the fact

that at one point during the alleged assault, S.T. had claimed in her statement that the applicant had touched her face and mouth while in the account given to one of the witnesses she had said that she had touched her own face at the instigation of the applicant. While it was certainly open to the defence to attempt to challenge the credibility of S.T., it is difficult to see on what basis they could have done so, particularly as her account corresponded in large part with that of the other complainant, with whom the trial judge found that there was no evidence of collusion. The absence of collusion may be a factor in domestic law in favour of admissibility but in the present case it cannot be regarded as a counterbalancing factor for the purposes of Article 6 § 1 read with Article 6 § 3(d). The absence of collusion does not alter the Court's conclusion that the content of the statement, once admitted, was evidence on count one that the applicant could not effectively challenge. As to the judge's warning to the jury, this was found by the Court of Appeal to be deficient. Even if it were not so, the Court is not persuaded that any more appropriate direction could effectively counterbalance the effect of an untested statement which was the only evidence against the applicant.

43. Therefore the Court finds a violation of Article 6 §§ 1 read in conjunction with Article 6 § 3(d) of the Convention in respect of Mr Al-Khawaja.

4. Tahery's case

44. In turning to Mr Tahery's case, the Court first notes that, while the witness T. was absent, he was not anonymous. Although the trial judge found witness T. to have a genuine fear of giving evidence, no attempt was made to conceal his identity: he was known not only by the applicant but by all the others present at the scene of the crime. Nonetheless, the Court accepts the trial judge's informed view that T. had a genuine fear and that this was the reason why the judge allowed his statement to be adduced in evidence.

45. In this case, the Government relied on the following principal counterbalancing factors: that alternative measures were considered by the trial judge; that the applicant was in a position to challenge or rebut the statement by giving evidence himself and by calling other witnesses; that the trial judge warned the jury that it was necessary to approach the evidence given by the absent witness with care; and that the judge told the jury that that the applicant was not responsible for T.'s fear.

46. The Court does not find that these factors, whether considered individually or cumulatively, would have ensured the fairness of the proceedings or counterbalanced the grave handicap to the defence that arose from the admission of T.'s statement. It is appropriate for domestic courts, when faced with the problem of absent or anonymous witnesses, to consider whether alternative measures could be employed which would be less

restrictive of the rights of the defence than admitting witness statements as evidence. However, the fact that alternative measures are found to be inappropriate does not absolve domestic courts of their responsibility to ensure that there is no breach of Article 6 §§ 1 and 3 (d) when they then allow witness statements to be read. Indeed, the rejection of less restrictive measures implies a greater duty to ensure respect for the rights of the defence. As regards the ability of the applicant to contradict the statement by calling other witnesses, the very problem was that there was no witness, with the exception of T., who was apparently able or willing to say what he had seen. In these circumstances, the Court does not find that T.'s statement could have been effectively rebutted. The Court accepts that the applicant gave evidence himself denying the charge, though the decision to do so must have been affected by the admission of T.'s statement. The right of an accused to give evidence in his defence cannot be said to counterbalance the loss of opportunity to see and have examined and cross-examined the only prosecution eye-witness against him.

47. Finally, as to the trial judge's warning to the jury, the Court accepts that this was both full and carefully phrased. It is true, too, that in the context of anonymous witnesses in *Doorson*, cited above, § 76, the Court warned that "evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care". In that case, it was satisfied that adequate steps had been taken because of the express declaration by the Court of Appeal that it had treated the relevant statements "with the necessary caution and circumspection". However, in the case of an absent witness such as T., the Court does not find that such a warning, including a reminder that it was not the applicant who was responsible for the absence, however clearly expressed, would be a sufficient counterbalance where that witness's untested statement was the only direct evidence against the applicant.

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

50. The applicants argued that unlike the majority of Article 6 cases, it could properly be said that their conviction for the offences in question and their subsequent sentences of imprisonment for those offences would not have occurred had it not been for the violation. Based on the additional time they served in prison for the offences in question and with reference to comparable domestic awards for unlawful detention, Mr Tahery claimed GBP 65,000 (approximately EUR 83,830) and Mr Al-Khawaja claimed GBP 20,000 (approximately EUR 25,820) for non-pecuniary damage

51. In the *Tahery* case the Government denied there was any causal connection between the alleged violation and the conviction of the applicant, emphasising that it was not suggested by the Court of Appeal that in the absence of the evidence of T., the applicant was bound to be acquitted; rather that "the prospect of a conviction would have receded". In the Al-*Khawaja* case the Government relied on the fact that the applicant received a sentence of 15 months' imprisonment on count one (the charge involving S.T.) and 12 month's imprisonment on count two, to be served consecutively. It was not possible to say what sentence would have been given if the applicant had been convicted solely on count two since the trial judge had been required to consider the totality of the consecutive sentences to ensure this was not excessive. The damage alleged by the applicant was therefore speculative. If the Court were to find it appropriate to make an award of non-pecuniary damages, it was not bound by the domestic scales of damage. A much lower sum, such as the 6,000 EUR awarded in *Visser*, cited above, § 56, would be appropriate.

52. The Court accepts that domestic case-law is of limited relevance to the question of non-pecuniary damage in proceedings before it (*Gault v. the United Kingdom*, no. 1271/05, § 30, 20 November 2007). However, the fact remains that the criminal proceedings against the applicants, at least in respect of those charges which were based on the statements of the absent witnesses, were not conducted in conformity with the Convention and the Court finds that the applicants inevitably have suffered a degree of distress and anxiety as a result. Making its assessment on an equitable basis, the Court awards each of the applicants the sum of EUR 6,000 by way of compensation for non-pecuniary damage.

B. Costs and expenses

533. The applicants also claimed a total of GBP 12,682.98 for the costs and expenses incurred before the Court, which is approximately EUR 16,302.96.

This comprised GBP 5,571.47 (inclusive of VAT) for approximately forty-five hours' work by Ms Trowler and GBP 3,050 (inclusive of VAT) for approximately sixteen hours' work by Mr Bennathan, both of which sums included attendance at the hearing and travelling time to Strasbourg. Mr Tahery's solicitor's costs and expenses were GBP 2,423.56 (inclusive of VAT) which covered costs of GBP 1,734.16 for approximately fifteen hours' work and GBP 689.40 in expenses. Mr Al-Khawaja's solicitor submitted a bill of costs for GBP 1,637.95.

54. The Government had no comment to make on the final consolidated bills of costs submitted by the parties but had previously noted that the claim for Mr Al-Khawaja had not been explained by reference to hours worked or rates charged.

55. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The Court agrees with the Government that the claim in respect of Mr Al-Khawaja's solicitor is not itemised and so it makes no award under this head. However, in respect of the remainder of the applicants' claims, the Court finds the amount claimed is not excessive in light of the complexity of the cases and the hearing held. It therefore considers that the remainder of the applicants' costs and expenses should be met in full. It therefore awards them EUR 14,198, inclusive of VAT, less EUR 2,300 already received in legal aid from the Council of Europe, to be converted into pounds sterling on the date of settlement.

C. Default interest

56. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3(d) of the Convention in respect of Mr Al-Khawaja;

4. *Holds* that there has been a violation of Article 6 § 1 read in conjunction with Article 6 § 3(d) of the Convention in respect of Mr Tahery;

5. *Holds*

(a) that the respondent State is to pay each of the applicants within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into pounds sterling at the rate applicable at the date of settlement;

(b) that the respondent State is to pay the applicants within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 14,198 (fourteen thousand one hundred and ninety-eight euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement, less EUR 2,300 (two thousand three hundred euros;

(c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 20 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Josep Casadevall President