needless complication to the trial, and where one does serve and the defendant is convicted, a new and needless ground for possible appeal. And in theoretical terms, however honest the individual officer, in public perception a policeman is a member of the opposing team; and so like Andy Capp with his rosette, he should not be acting as a referee.

The government should now make a virtue out of necessity and, taking the initiative, reverse the change its predecessor made before another Strasbourg condemnation forces it to do so.

J. R. SPENCER

HEARSAY EXCEPTIONS AND FAIR TRIAL RIGHTS IN STRASBOURG

ARTICLE 6(3)(d) of the European Convention on Human Rights guarantees a defendant, *inter alia*, "the right to examine or have examined witnesses against him". This right creates a problem for the prosecution when the witness cannot be brought before or questioned by the trial court. The European Court of Human Rights has, however, long accepted that the content of a statement made by an unobtainable witness whom the defence had no opportunity to question may nonetheless be introduced at a later trial, provided that it is necessary to do so and that the resulting handicaps for the defence are sufficiently counterbalanced. Until recently, however, the Strasbourg case law also insisted that such untested statements may not constitute the "sole or decisive" basis on which a defendant's conviction rests (*cf. Lucà v Italy*, Appl. No. 33354/96, E.C.H.R. 2001-II, at [40]).

The high water mark of this restrictive jurisprudence was reached early in 2009 when the Fourth Section of the Court concluded that the UK had in two separate trials violated the rights of defendants by basing their convictions on out-of-court statements of key witnesses whom the defence had not had any opportunity to question: *Al-Khawaja and Tahery v UK* nos. 26766/05 and 22228/06, 20 January 2009, (2009) 49 E.H.R.R. 1. This finding seriously put into question the regime of hearsay exceptions in the Criminal Justice Act 2003 ("CJA"), which supplanted and expanded exceptions already created in previous legislation. After the UK's request for a referral of the applications to the Grand Chamber, the domestic judiciary rode out in full force against the "sole or decisive" test as applied by the Fourth Section (see *R. v Horncastle* [2009] UKSC 12, [2010] 2 A.C.1). By a majority of 15 to 2, the final judgment of the Grand Chamber, delivered on 15 December 2011, (2012) 54 E.H.R.R. 23, found that there was no violation of Article 6(3)(d) in respect of the applicant Al-Khawaja, who had been convicted of a minor sexual offence on the basis of a statement made to

the police by the complainant who had later committed suicide before the trial. The Grand Chamber did, however, find that Article 6(3)(d) was violated in respect of the applicant Tahery. He had been convicted of a stabbing on the evidence of a witness involved in the original disturbance who had approached the police some days after the incident to give a statement implicating the applicant but had refused to give evidence in court because he feared the possible reaction of other members of his and the defendant's ethnic community. This note focuses on the significance of the Grand Chamber's decision for the future application of the hearsay provisions in the CJA 2003.

The statement of the dead witness was admitted in evidence pursuant to CJA 1988, s. 23(2)(a), now superseded by CJA 2003, s. 116(2)(a). The Grand Chamber's conclusion that its admission did not restrict the rights of the defence more than necessary – that is, that the extent to which these rights were restricted was unavoidable – is surely correct. The untimely death of the complainant-witness by suicide created an insurmountable factual barrier to bringing the witness to court. Moreover the later unavailability of the witness could not have been foreseen by the investigating authorities, (unlike in cases where a witness is visibly nearing death at the time of her earlier statement).

The statement of the fearful witness was admitted in evidence under CJA 2003, s. 116(2)(e), which permits the court to give leave for a statement to be read in court if "through fear the relevant person does not give … oral evidence in the proceedings", where according to sub-s (3) "'fear' is to be widely construed and includes fear of the death or injury of another person or of financial loss". In the view of the Grand Chamber, this ground equally passed the necessity hurdle for a permissible adduction of witness statements despite Article 6(3)(d). The Grand Chamber stressed that when a witness's fear was attributable directly to threats made by or on behalf of the defendant, the defendant in effect lost the protection of Art. 6(3)(d) in respect of that witness (at [123]). But even a witness whose fear of testifying was not attributable to the defendant's influence may be excused from giving oral evidence, provided that the trial court satisfied itself that there were objective grounds for that fear, supported by evidence, and that available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable (at [124], [125]), a standard that in Tahery's case the trial judge's careful inquiry into the existence and grounds of the unwilling witness's fear had met.

Of course, the Grand Chamber is, in principle, right to accept that it can be appropriate for exceptions from the duty to testify in court to be made in respect of witnesses who are fearful of testifying openly. But in future cases the legitimate grounds for such fear may need to be given more careful scrutiny. While the witness in *Tahery* appears to have

been concerned for his own physical safety, the Grand Chamber also accepts that fear of financial loss may be among the legitimate grounds for permitting a witness not to give evidence in court (at [124]). This is overly generous to prosecutors. A witness who merely fears "financial loss" must still be expected to perform her citizen's duty to give evidence in court. The concern that a witness who can legitimately be required to give truthful testimony in court may in fact opt for the easier route of retracting earlier statements or pretending memory loss, has nothing to do with the balancing of legitimate interests of witnesses against legitimate interests of defendants. What drives admission of the out-of-court statement in these cases is the wish to facilitate proof of the prosecution's case at the expense of the defendant's rights behind a mere smokescreen of supposed witness protection.

The second stage of the Grand Chamber's enquiry concerns the question whether the handicaps created for the defence through the permissible introduction of the untested witness statements were sufficiently counterbalanced. In this context the Court was not prepared to give up the "sole or decisive" test completely. The test, in its view, served an important dual purpose of, first, responding to the increased risk that the untested evidence might be "designedly untruthful or simply erroneous", and, second, of ensuring that the defendant was not "effectively deprived of a real chance of defending himself by being unable to challenge the case against him" (at [142]). That said, the Grand Chamber reasoned, the test can serve these functions better if it is not applied "in an inflexible manner" but with some regard to "the specificities of the particular legal system concerned and, in particular its rules of evidence" (at [146]). Applying this standard, the Grand Chamber held that Tahery (who faced the same difficulties as the prosecution did in that he was unable to persuade any of the numerous witnesses to the incident to testify in court), but not Al-Khawaja (in whose case other evidence existed and could be challenged) had been left without any real chance of challenging the admitted statement. Importantly, however, and contrary to what Lord Phillips appears to suggest in *Horncastle* (at [92]), unfairness is not *ipso facto* avoided by preventing unreliability: "The Court's assessment of whether a criminal trial has been fair cannot depend solely on whether the evidence against the accused appears *prima facie* to be reliable, if there are no means of challenging that evidence once it is admitted" (GC, at [142]).

One consequence of the Court's view is that the defendant might be required to shoulder considerable disadvantages to his defence before he is held to have been deprived of any real chance of defending himself. *Al-Khawaja* is a case in point. His main line of defence against the allegations made against him was that the complainants, who had been

hypnotised as part of their treatment, had imagined the conduct they accused him of due to their altered perception of reality under hypnosis. It is not inconceivable that this argument would have been bolstered by answers elicited via defence questioning of the first complainant.

From the point of view of domestic law, the most important question is whether the Grand Chamber's decision gives the hearsay regime in the CJA 2003 a clean bill of health. In the opinion of this author, it does not. First, it is questionable whether s. 125 CJA 2003, which enables the court to stop proceedings if it considers the hearsay evidence "so unconvincing that a conviction would be unsafe", is enough to safeguard the second objective of the "sole or decisive" test of ensuring that the defendant has a true opportunity to challenge the evidence against him. The Court's reasoning implicitly accepts that even the reliance on *convincing* hearsay evidence may sometimes be *unfair*. English judges will in the future have to contemplate that possibility as a reason for staying a trial. Secondly, there is a real risk that, in admitting hearsay evidence pursuant to the guidance given in the CJA 2003, s 116(4)(b), which instructs the court to have regard to "any risk that its admission or exclusion will result in unfairness to any party", English judges might be tempted to play "the interests of the prosecution" off against the rights of defendants. But the rights the Convention guarantees to defendants are not private privileges. They signal that the *public* interest lies in prosecuting defendants in trials in which these rights are respected. Their curtailment may be necessary to protect the rights of others, such as vulnerable witnesses, but it ought not to be done simply to ease the prosecution's task. Nothing in the decision of the Grand Chamber supports the view that mere prosecutorial convenience may trump defendants' rights.

ANTJE DU BOIS-PEDAIN

KILLING THE UNFAITHFUL

SUPPOSE D finds his partner, V, having sexual intercourse with X. D loses self-control and kills V. Assuming he is to be convicted of a homicide offence, should D be convicted of murder, or manslaughter? Under the old law of provocation, if the reasonable man might similarly have lost self-control and killed V, D would be a manslaughterer (Homicide Act 1957, s. 3). This approach was considered by some to privilege male sexual possessiveness, and underplay V's sexual autonomy. For this reason (and others), provocation was abolished and