United Kingdom, England and Wales Court of Appeal, R v Ibrahim, Judgment of 27 April 2012

Deciding bodies and decisions

England and Wales Court of Appeal, Criminal Division Judgment of 27 April 2012

Subject matter

Admissibility of (untested) hearsay evidence of a complainant who died after giving statements to the police but before trial

Summary Facts Of The Case

Mr Ibrahim was convicted of three counts of rape in 2006. After he became aware of the forthcoming decision of the ECtHR (Grand Chamber) in *Al-Khawaja*, he appealed his conviction regarding one of the counts, claiming that it had been decided on the basis of inadmissible evidence because the Birmingham Crown Court had used hearsay evidence (notably, three signed statements to the police by one of the victims that had died before the trial). The Court of Appeal granted the leave to appeal, and suspended the hearings to wait for the Grand Chamber's decision. After the Strasbourg judgment delivered on December 15, 2011, the trial was continued. The defence complained that it was not possible to cross-examine the witness on various contradictions on her statements, and therefore these could not be used by the jury. The judge, instead, considered them admissible, but instructed the jury to take into account a document prepared by the defence that highlighted the dubious parts of the statements.

It must be noted that, under UK law (notably, the Criminal Justice Act of 2003), there is a general presumption that hearsay evidence must not be allowed in criminal trials; nevertheless, in certain circumstances this presumption can be defeated, as is the case when the witnesses died before the trial.

The legal facts of *Ibrahim* were similar to those of a previous case decided by the UK Supreme Court, *R.* v *Horncastle*. There the applicants had invoked the string of case law of the ECtHR – culminated with the Chamber's decision in *Al-Khawaja v UK* [2009] – according to which, although hearsay evidence can be allowed if "sufficient counterbalances" are provided, it would constitute a breach of Art 6 ECHR reaching a decision based solely on such evidence (the "sole and decisive criterion"). Accordingly, in *Al-Khawaja* the ECtHR had found the UK in breach of Article 6 ECHR, having allowed the conviction of two men solely on the base of untested hearsay evidence. Deciding in *Horncastle*, the UK Supreme Court (and also the Court of Appeal) examined in great detail the relevant jurisprudence of the ECtHR, and declined to follow it, rather upholding the solution endorsed in the Criminal Justice Act.

The UK also appealed *Al-Khawaja*, and in its judgment the Grand Chamber of the ECtHR, taking

into account the criticisms raised to its case law by the UK Court of Appeal and Supreme Court in *Horncastle*, embraced a more flexible approach. In the Court's own words, "where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6(1) [ECHR].At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, (…), and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case". As regards, more specifically, the UK Criminal Justice Act, the ECtHR found that the safeguards therein are, in principle, "*strong safeguards designed to ensure fairness"*, though one needs to *appreciate* their practical application in the case at hand.

In *Ibrahim*, the Court of Appeal considered that the differences in the approach of the UK courts and the ECtHR (after the Grand Chamber's judgment in *Al-Khawaja*) are more formal than substantive; it then singled out the requirements – apparently common to the national and supranational courts – that must be satisfied for untested hearsay evidence to be allowed: firstly, there has to be good reason (or a "*justification*", in the words of the ECtHR); secondly, there must be an enquiry as to whether that evidence can be shown to be reliable; thirdly, there must " *counterbalancing measures*", which need to be properly applied in deciding whether to admit the "critical" untested hearsay evidence. , it noted that it was not appropriate to use the "sole and decisive" criterion to exclude the admissibility both in the case of absent and identified witnesses. For absent witnesses, the guarantees embedded in UK law would be sufficient to prevent a breach of Art 6 ECHR (unlike for unidentified witnesses). Under UK law, statement notes can be used in exceptional cases. The statement must be such as would be admissible if given orally, the identity of the person must be certain and there must be a compelling reason to derogate from the vital principle of the "right of confrontation" However, courts can exclude hearsay evidence if their admission would greatly affect the fairness of the proceedings. The Court considered that these "counterbalancing measures" are sufficient safeguards against the risk of unfairness, and therefore are in compliance with the benchmark set in *Horncastle* and in the *Al-Khawaja* GC judgment.

In the specific instance, the Court of Appeal concluded that the judge of the Crown Court had not instructed the jury with sufficient care with respect to the nature of the hearsay evidence. In so doing, he had not properly applied the "counterbalancing measures" offered by UK law, and therefore the right of the applicant under Art 6 ECHR had been indeed infringed. The appeal was upheld, and the conviction quashed.

Diagram

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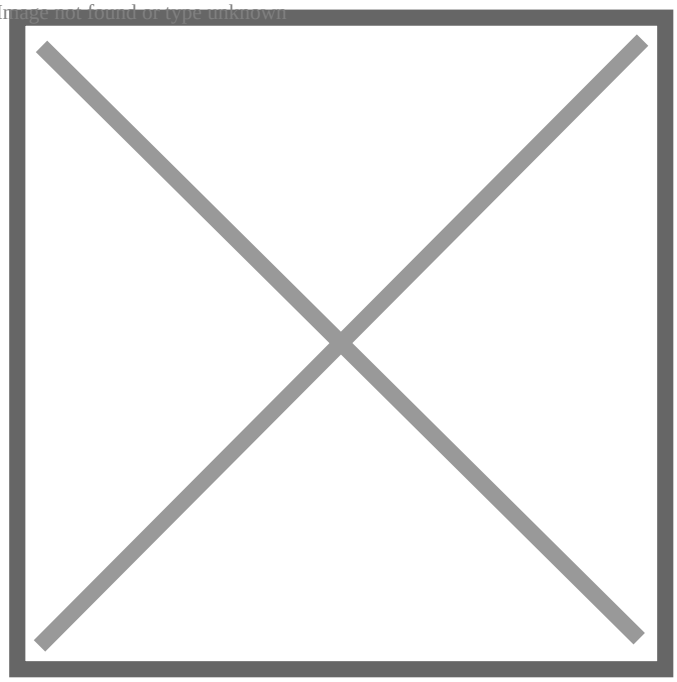

In *Horncastle*, the UK Supreme Court upheld the solution endorsed by the national legislator as regards the admissibility of untested hearsay evidence, overtly diverging from the solution endorsed by the Strasbourg Court. Later on, this embraced a more flexible approach, taking into account *Horncastle*. In *Ibrahim*, the England and Wales Court of Appeal performed consistent interpretation with both the ECtHR's and the Supreme Court's case law, though affirming that, in case of incoherence, it would give priority to the approach of the Supreme Court.

Impact on Jurisprudence

In the twin case *Riat and Others* (which consisted of a number of separate appeals, joined in one trial because they all involved the use of hearsay) the Court reviewed for each case whether the admission of hearsay evidence, in the framework of each proceedings, would constitute a breach of fair trial or could be justified in light of the counterbalancing effect of the normative safeguards offered by UK law. In so doing, it followed the *Horncastle* approach, validated by the Grand Chamber and implemented in *Ibrahim*.

Interestingly, the Court of Appeal noted that, in the event that the conditions set by the SC in *Horncastle* and by the ECtHR in *Al-Khawaja* were deemed not to be identical, it would have to follow the instructions of the Supreme Court.

Sources - ECHR

Article 6 (in particular, paragraphs 1 and 3, lit. d)

Sources - ECtHR Case Law

- *Doorson v The* Netherlands, App. no 20524/92 26 March 1996
- *Al-Khawaja and Tahery v United Kingdom* (Grand Chamber), App. nos. 26766/05 and 2228/06, 15 December 2011
- *Lucà v Italy*, Appl. No. 33354/96, 27 January 2001
- *Kostovski v The Netherlands*, App. no. 11454/85,20 November 1989

Sources - Internal or external national courts case law

- *R v Galbraith [1981]* 1 WL R 1039;
- House of Lords (now Supreme Court), *R(RJM) v Work and Pensions Secretary* [2009] 1 AC 311 (the House of Lords stated that where the Court of Appeal considers that an earlier decision of the House of Lords, which would otherwise be binding on the Court of Appeal, may be, or even is clearly, inconsistent with a subsequent decision of the ECtHR, then, other in wholly exceptional circumstances, the Court of Appeal must faithfully follow the decision of the House of Lords).

Comments

A. This is a case of **extended dialogue** between domestic courts and the ECtHR: the national court endorses the last development of the Strasbourg case-law, which in turn had changed its own jurisprudence to accept the position of the UK Supreme Court on the compatibility of national law with Art 6.

B. The Court of Appeal declares that, in a case of divergence between the UK SC and the ECtHR, it will feel bound to follow the former, thus **sacrificing external for internal judicial dialogue**.

C. The ECtHR in Al-Khawaja interprets Art. 6 consistently, i.e. **adapts its interpretation to the approach of UK courts** to make the safeguards against the use of hearsay more flexible (Cf. with the *Melloni* saga where it was the national level that had a higher level of protection).

D. The national courts **refer to ECtHR case law and interpret national law consistently**, i.e. examine whether the domestic safeguards are sufficient; in so doing they also criticize the Strasbourg jurisprudence.

E. The national court **suspends proceedings** to await the resolution of the matter by the ECthR.