



9 December 2009

## PRESS SUMMARY

### **R v Horncastle and others (Appellants) [2009] UKSC 14**

*On appeal from the Court of Appeal (Criminal Division) [2009] EWCA Crim 964*

**JUSTICES:** Lord Phillips (President), Lady Hale, Lord Brown, Lord Mance, Lord Neuberger, Lord Judge and Lord Kerr

### **BACKGROUND TO THE APPEAL**

The appellants were convicted of serious criminal offences after trials in which the victims of the offences did not give evidence: in one case because he had since died and in the other because she had run away in fear when the trial was about to commence. In each case a statement from the victim was admitted pursuant to s 116 Criminal Justice Act 2003 and placed before the jury.

The appellants complained that their convictions were based ‘solely or to a decisive extent’ on the statement of a witness whom they had had no chance to cross-examine. This had infringed their right to a fair trial guaranteed by articles 6(1) and 6(3) of the European Convention on Human Rights which provide:

*‘6(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’.*

The Court of Appeal had dismissed the appellants’ appeals against conviction, holding that the test of fairness laid down by the European Court of Human Rights in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 was not determinative of the results in these appeals. The United Kingdom had requested that this decision be referred to the Grand Chamber of the Strasbourg Court. On 5 June 2009 the Panel of the Grand Chamber adjourned consideration of that request pending the judgement of the Supreme Court in this case.

### **JUDGMENT**

***The Supreme Court unanimously dismissed the appeal. The judgment of the court was given by Lord Phillips, President.***

## REASONS FOR THE JUDGMENT

- The questions before the court were (i) whether the regime enacted by Parliament in relation to the admission of the evidence of an absent witness at a criminal trial will result in an unfair trial and, if not (ii) whether the case law of the European Court on Human Rights nonetheless requires the court to apply that regime in a manner contrary to the intention of Parliament.
- The requirement to take into account any judgment of the European Court of Human Rights found in s 2 Human Rights Act 1998 would normally result in the Supreme Court applying principles that were clearly established by the Strasbourg court. There would however be rare occasions where the court had concerns as to whether a decision of the Strasbourg court sufficiently appreciated or accommodated particular aspects of the UK trial process. In such circumstances it was open to the Supreme Court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This was likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that was in issue, so that there took place what might prove to be a valuable dialogue between the courts [para 11].
- The conclusions of the Court of Appeal were correct and the judgement of the Supreme Court should be read as complementary to that of the Court of Appeal and not as a substitute for it [para 13].
- The Supreme Court held that the appellants' trials were fair notwithstanding the decision in *Al-Khawaja* for the following reasons:
  - (i) The common law hearsay rule addressed the aspect of a fair trial covered by article 6(3)(d). Parliament had enacted exceptions to the hearsay rule in a regime which contained safeguards that rendered the 'sole or decisive' rule unnecessary.
  - (ii) The Strasbourg Court had recognised that exceptions to article 6(3)(d) were required in the interests of justice but the jurisprudence on the exceptions lacked clarity and had introduced a 'sole or decisive' rule without discussion of the principle underlying it or full consideration of whether it was justified to impose it equally on common law and continental jurisdictions
  - (iii) The sole or decisive rule would create severe practical difficulties if applied to English criminal procedure. In almost all cases English law would reach the same result without it. *Al-Khawaja* did not establish that it was necessary to apply the rule in this jurisdiction.

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html)**