

THE TREATMENT OF HEARSAY IN THE CONVENTIONAL FIELD. THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS

O TRATAMENTO DE BOATOS NO CAMPO CONVENCIONAL. O PAPEL DO TRIBUNAL EUROPEU DOS DIREITOS DO HOMEM

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Abstract:The judges in Strasbourg claim to reason. Our scope will now try to illustrate their position in relation to the two different areas. First, the probative limits that, in some national contexts, seem to be aimed primarily at making the search for truth in the process more efficient; after that, the attention will be shifted to the rules of proof placed to protect the interests of the endoprocessual or extraprocessual other than the ascertainment of the facts.

Keywords: Hearsay evidence; Bad character; Opinion evidence; ECtHR; ECHR.

Resumo: *Os juízes em Estrasburgo alegam raciocinar. Nosso escopo agora tentará ilustrar sua posição em relação às duas áreas diferentes. Primeiro, os limites probatórios que, em alguns contextos nacionais, parecem ter como objetivo principal tornar a busca pela verdade no processo mais eficiente; depois disso, a atenção será desviada para as regras de prova colocadas para proteger os interesses do endoprocessual ou extra-processual que não sejam a apuração dos fatos.*

Palavras-chave: *Evidência de boato; Mau caráter; Evidência de opinião; TJAR; ECHR.*

SUMMARY: 1. Introduction. 2. The hearsay rule according to the European Court of Human Rights. 3. (Follows) From *Al-Khawaja and Tahery v. The United Kingdom* to *Schatschaschwili v. Germany* and *Boyets v. Ukraine*. 4. (Follows) Bad character and opinion evidence. Conclusion. References.

1 INTRODUCTION

Outlining the salient features of the “conventional probation system”, attention is focused on the circumstances in which the Strasbourg judges limit the use of evidence acquired in violation of consecrated rights in the European Convention on Human Rights (ECHR), as well as on the instruments used to carry out this delicate task (ERGEÇ, VELU, 2014, p. 1972ss; HARRIS, O’BOYLE, BATES, BUCKLEY, 2014; RAINEY, W. WICKS, C. OVEY, 2014). The comparison with the corresponding national cases is then aimed at the discovery of similarities and differences between the two levels of protection, as well as a better understanding of the way of reasoning of the European Court of Human Rights (ECtHR) and the ratio underlying its guidelines (LIAKOPOULOS, 2018).

According to the English common law, the non-observance of the evidentiary discipline is cause of the exclusion of the acquired elements, only if it has compromised the reliability, or it is resolved in a violent, intimidating or deceptive behavior of the investigators, finalized to obtain the self-incrimination the suspect. Following the release of the Police and Criminal Evidence Act 1984 (KEANE, MACKEOWN, 2016, p. 312ss. DOAK, MCGOURLAY, THOMAS, 2018.), the boundaries of exclusionary discretion seem to have expanded. According to par. 1 of the aforementioned section 78:

[...] in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it [...]

The difference with the rule, forged within the common law, seems quite evident: in the meantime, there is no limitation regarding the reliability of the proof, or the protection of the right of the accused to avoid self-incrimination; secondly, the circumstances in which the proof was acquired are expressly referred to among the indices on which the fairness judgment of the judge must be based. Beyond the textual data, the limits of this last power of judicial exclusion, as well as its relations with the one already previously foreseen in the common law, are still the subject of lively debate, more than thirty years after its creation. Among all, the “reliability principle” (CHOO, 2013, p. 80-84) still continues to enjoy a decisive weight: although, in fact, section 78 (AA.VV., 2012, p. 146ss) seems at least to suggest a greater sensitivity towards the transgression of the rules governing the evidential acquisition, the relevance and reliability of the evidence is frequently the decisive factors. So, it seems difficult that an overwhelming real

test, found during an illegitimate search, is excluded, except that the violation of the law has raised doubts about the genuineness of the find: think, for example, a research activity carried out in the absence of witnesses, contrary to what is required by section 6.11 Code of Practice B334 (THAMAN, 2013). The power of exclusionary discretion referred to in section 78 (AA.VV., 2012) also applies outside the hypothesis of non-observance of the evidentiary discipline, for example, to exclude those evidence of hearsay and bad character, which, according to the Criminal Justice Act 2003, are to be considered fully admissible; just as the violation of the legislative provisions is not alone considered sufficient to make unfair the use of the evidence obtained, symmetrically, their full respect may therefore not be sufficient to guarantee fairness: an admissible test, acquired through the rules established by the legislator, could in a specific case, however, be detrimental to the processual equity. The flexible English mechanism of the exclusionary discretion, as usual, offers however a further opportunity: nothing prevents the judge from taking „the view, for example, that a deliberate use of violence in order to coerce the accused into revealing the location of a weapon or of prohibited goods had such an adverse effect on the fairness of the proceedings that the evidence of the finding of the weapon or goods should not be admitted“ (THAMAN, 2013); in such a case, the latter may undoubtedly make use of its power as set out in Section 78 of the Police and Criminal Evidence Act and exclude the evidence, although this evidence always remains perfectly admissible.

Meanwhile, it is always and only a controller, who supervises the work of other judges and never directly decides on the merits of the prosecution, limiting itself to check whether the procedural path followed to reach the decision was in accordance with the conventional dictates (GOSS, 2014, p. 42-58; TRECHSEL, 2005, p. 82ss; RAINEY, WICKS, OVEY, 2017)¹.

The tools used to carry out this work are drawn exclusively from the essential indications provided by the ECHR: the characteristics of the national regulations,

¹ ECtHR, Sakit Zahidov v. Azerbaijan of 12 November 2015, par. 47: “(...) it is therefore not the role of the Court to determine, as a matter of principle (...) whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole (...) were fair”; Alchagin v. Russia of 17 January 2012, par. 63; Jalloh v. Germany of 11 July 2006, par. 95; Allan v. The United Kingdom of 5 November 2002, par. 42; Nițulescu v. Romania of 22 September 2015, par. 43, which is stated that: “(...) the Court reiterates that its duty, pursuant to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court, unless and in so far as they may have infringed rights and freedoms protected by the Convention (...)”; In the same spirit see also: Grande Stevens v. Italy of 4 March 2014, par. 158; Khan v. The United Kingdom of 12 May 2000, par. 34; Karpenko v. Russia of 13 March 2012, par. 80, which is stated that: “(...) as to the remaining complaints raised by the applicant in his original application, the Court notes that it is not its task to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts (...)”.

as well as their compliance by the internal authorities, are often considered to be scarcely relevant factors for the solution of the case (POWELS, 2009, p. 312ss)².

Paradoxically, while constituting a superordinate judge and “without rules”-aspects that, in themselves, seem to entrust a conspicuous freedom of action, the ECtHR tends to seek compromise solutions, far more than it is brought to make a national judicial authority; The purpose of the ECHR is certainly not to resolve the differences existing between the member States of the Council of Europe, of course, provided that these do not prove to be an obstacle to the protection of the rights enshrined therein³. As regards the probative material, then-and, even more so, the rules of exclusion-the situation is even more complex (COSTA, 2017), because-each national system (OUWERKERK, 2015, p. 11) tries to contain the number of information sacrificed along the path leading to the reconstruction of the facts. In order to carry out this delicate role of supranational control in the field of evidence, the ECtHR seems to move against the background of a series of general premises, which open, in a more or less similar way, every arrest on the subject. The latter attempts to place a clear limit on its ability to interfere: it is, in fact, frequently stated that “the admissibility of evidence is a matter for regulation by the national law and the national courts” and that “the Court’s only concern is to examine whether the proceedings have been conducted fairly” (SETTEM, 2015; REDMAYNE, 2012, p. 866ss; DE LONDRAS, DZEHTSIAROU, 2018)⁴.

This interpretation, as we know, is based on a purely literal interpretation of the ECHR text, which, while guaranteeing, art. 6, “*le droit à un procès équitable*” (DE LONDRAS, DZEHTSIAROU, 2018), in effect, does not give any explicit indication regarding the question of the admissibility of the evidence⁵.

On the basis of this assumption, the ECtHR therefore comes to argue that it is not entitled to interfere with the regulatory choices regarding the probable

² ECtHR, Toran and Schymik v. Romania of 15 April 2015, par. 51: “(...) the Court’s task is not to determine whether certain items of evidence were obtained unlawfully, but rather to examine whether such “unlawfulness” resulted in the infringement of another right protected by the Convention (...)”. in the same spirit: nello stesso senso, Ramanauskas v. Lituania of 5 February 2008, par. 52. POWELS, 2009, p. 312ss.

³ ECtHR, Schatschaschwili v. Germany of 15 December 2015, par. 109.

⁴ ECtHR, Kostecki v. Poland of 4. July 2013, par. 59; Vigden v. Netherlands of 10 July 2012, par. 38; Al-Khawaja and Tahery v. The United Kingdom of 15 December 2011, par. 18.

⁵ ECtHR, Tseber v. Republic Czech of 22 November 2012, par. 42: “la Cour rappelle d’emblée qu’il ne lui appartient pas d’agir comme juge de quatrième instance, d’apprécier la légalité des preuves au regard du droit interne des Etats parties à la Convention et de se prononcer sur la culpabilité des requérants. En effet, si la Convention garantit en son article 6 le droit à un procès équitable, elle ne régleme pas pour autant l’admissibilité des preuves en tant que telle, matière qui relève au premier chef du droit interne (...)”.

types of evidence, nor to be able to review the decision of a judicial authority to acquire a specific proof, even if it is of “evidence obtained unlawfully in terms of domestic law” (BELING, 2016, p. 67ss)⁶.

The only probative limit, for judges and legislators, imposed by the conventional fabric, is precisely the respect of the right-first of the accused-the carrying out of a “fair trial” (HOYANO, 2014, p. 28ss)⁷. In the view of the Bavarian judges, “equitable” must also be the way in which the evidence is collected, formed and finally used; so that, although the ECHR refrains from authorizing the acceding States to create a particular regulatory framework for exclusion rules, in the individual case, the acquisition of a given test could in any case appear to be materially detrimental to the legal process (LIAKOPOULOS, 2018).

In addition to proclaiming its lack of interest in the abstract question of admissible evidence, the ECtHR also constantly reminds that the judgment on fairness of the procedure will be carried out “as a whole” (POLAKIEWICZ, 2010, p. 12ss; TIMMERMANS, 2013, p. 225ss), i.e taking into account the conduct of the judgment in all its aspects. Therefore, a single factor-albeit potentially contrary to fairness-might not be conclusive for the purposes of the judgment on the overall compliance of the procedure with art. 6 of the ECHR (MCDERMOTT, GOSS, 2015; DAHLBERG, 2014, p. 86ss; SIDHU, 2017), because other elements of the specific case may have compensated for its effects. As a general rule, there should therefore be no indispensable conditions, the failure to implement automatically leads to a violation of the right to a fair trial (VIERING, 2006, p. 579ss. LIAKOPOULOS, 2007)⁸.

These are two pillars that govern every decision of the ECtHR in probation matters; essentially, on the one hand, the abandonment of the dichotomy-purely national-between admissible and inadmissible evidence in favor of the more flexible fair or unfair trial and, on the other, of the adoption of a type of judgment avulsed -at least in principle-from abstract evaluations.

⁶ ECtHR, Jannatov v. Azerbaijan of 31 July 2014, par. 68; Gäfgen v. Germany of 1st June 2010, par. 163; Panovits v. Cyprus of 11 December 2008, par. 81.

⁷ Noted that: “(...) the right to a fair trial is also an inconvenient right (...) so too is the enumerated right to confrontation set out in the Sixth Amendment. Enforcing these rights will sometimes result in the exclusion of hearsay statements where a defendant was not afforded an opportunity to challenge the evidence (...)”.

⁸ ECtHR, Al-Khawaja and Tahery v. The United Kingdom of 15 December 2011, par. 144: “(...) traditionally, when examining complaints under Article 6, par. 1, the Court has carried out its examination of the overall fairness of the proceedings by having regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge (...)”.

However, a certain affinity between the thinking of the European judges and the current conformation of the English mechanism of probationary exclusion seems to be undeniable, in which an overwhelming majority of evidence, de facto admissible, serves to counter the power and duty of the judge to exclude them, if in the specific case, their admission involves “an adverse effect on the fairness of the proceedings” (section 78 Police and Criminal Evidence Act 1984) (ZANDER, 2013)⁹.

In truth, the “minimum” system obtainable from the aforementioned premises of the ECtHR seems even simpler: it does not provide for any exclusionary rule (LIAKOPOULOS, 2016) and the keeping of the right of the tests revolves around the judicial power to exclude the evidence injurious to the trial; in hypothesis, a code of criminal procedure would seem to be fully compliant with these Strassione dictates which-far from foreseeing complex networks of general and special probative prohibitions-rely entirely on the exclusionary discretion of the Anglo-Saxon matrix (THAMAN (ed.), 2013, p. 412ss. OHLIN, 2013, p. 62ss), setting a single rule in all similar to the section 78 Police and Criminal Evidence Act 1984. This resemblance must not however be mistaken for a position in favor of the probative discipline of common law (FALLON, 2011, p. 6ss. MADDEN, 2012, p. 411ss. PARUCH, 2018, p. 106ss)¹⁰. Simply, the European judges-to appear as less invasive as possible than the choices of the single national legal systems-needed to prepare a theoretical basis for their decisions which, in the

⁹ See some leading cases: *Howarth v. Metropolitan Police Commissioner* (2011) All ER (D) 60 (2011) EWHC 2818 (QB); *Castornia v. Chief Constable of Surrey* (1988), unreported; *R v. Walsh* (1989) 91 Cr App Rep 161, (1989); *R v. Chief Constable of Yorkshire Police, ex.p. Marper* (2004) UKHL 39; *S v. United Kingdom* (2009); *Marper v. United Kingdom* (2009) 48 EHRR 50; *Richardson v. Chief Constable of West Midlands* (2011) EWHC 773 (QB).

¹⁰ See in particular: The Supreme Court declared in case *California v. Green*, 399 U.S. 149 (1970), that: “(...) we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied (...)”. In the same orientation in case: *Ohio v. Roberts* 448 U.S. 56 (1980) and *Crawford v. Washington*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21939940. Justice Scalia opined that: “(...) the confrontation right applies to witnesses, which he defined as “those who “bear testimony” (...) testimony as a solemn declaration or affirmation made for the purpose of establishing or proving some fact (...) he refused to comprehensively define which statements would trigger constitutional protections, he acknowledged that various formulations of this core class of testimonial’ statements exist, including out-of-court statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial (...)”. In *Michigan v. Bryant*, 562 U.S. 344 (2011). The Court explained that: “(...) determining the primary purpose of an interrogation and whether an emergency exists is a fact-dependent inquiry that depends on a variety of factors including: the type and scope of danger to the police, victim, and public at large; the type of weapon involved; the victim’s medical condition; and the statements and actions of all of the individuals involved (...)”. As we can see in the case: *Ohio v. Clark*, 135 S. Ct. 2173 (2015).

first place, did not clash with the traditionally poorer systems of prohibitions, such as the French one, but which, however, allowed it to condemn, in the cases submitted to it, probative admissions detrimental to the rights sanctioned by the ECHR (HARRIS, O'BOYLE, WARBRICK, 2014, p. 372ss). The order that, more than others, combines these characteristics is undoubtedly the English one; obviously, however, nothing prevents the member states from adopting different solutions, provided they are able to satisfy the conventional indications.

2 THE HEARSAY RULE ACCORDING TO THE EUROPEAN COURT OF HUMAN RIGHTS

The question of the usability of the declarative evidence unilaterally formed outside the trial was among the most debated in the criminal procedure, so much so that it was traditionally considered one of the main elements that marks the gap between the systems of accusatory and those of an inquisitorial matrix. Execution in court of witnesses-with or without cross examination, but in any case with the participatory presence of the defendant or his defender-is in any case a guarantee whose value is somehow recognized within each of the four legal systems examined here.

It has also been said, however, that, on the other hand, the use of "preformed" declarations (DE LONDRAS, DZEHTSIAROU, 2018), in the absence of the private part, is by no means a rare eventuality; on the contrary, indirect witnesses, documents and minutes of investigative acts increasingly convey this type of proof in judgment, even in those systems that were once typically oriented in the opposite direction. The most restrictive system seemed, in some ways, the Italian one, although the prohibition of acquisition focuses mainly on the statements made to the investigators.

The picture is rather multi-faceted, but overall, a clear tendency has emerged to incorporate the declarative evidence independently of the training context, then entrusting the judge with the task of weighing up any fragility. If this is the current situation, the indications coming from the ECHR could then appear decidedly anachronistic: art. 6, par. 3, "d" (SEIBERT-FOHR, VILLIGER, 2017; GRABENWARTER, 2014), in its first part, establishes, in fact, unequivocally, that each accused has the right to "question or have the witnesses questioned", without expressly providing any kind of exception (MARCHADIER, 2014, p. 679-694; TEITGEN, 2013).

Therefore the problems that would cause the textual implementation of the aforementioned letter should therefore appear quite evident. d: although the

ECtHR systematically goes on to state that the ECHR is silent on the admissibility of the evidence, it seems undeniable that the strict observance of this provision would require the exclusion of statements made by individuals with whom the defense has never been able to compare. Many court systems would thus enter into crisis, without counting the automatic-and therefore unreasonable-sacrifice of the various interests, further than the defendant's defensive ones, which emerge during a criminal proceeding (JACKSON, SUMMERS, 2012, p. 335ss)¹¹.

The ECtHR certainly could not access such a solution. To understand the reason, just remember the background that led to the revocation of the sentence *Al-Khawaja and Tahery v. The United Kingdom*. The English Supreme Court- in the face of a conviction suffered by the Court of Strasbourg, in relation to the acquisition of some hearsay evidence- came to claim that the European courts acted "without full consideration of the safeguards against an unfair trial that exist under the common law procedure" (ROBERTS, HUNTER, 2012. JAIN, 2015, p. 488ss. ESTRADA-TANCK, 2016)¹² and, on the basis of this premise, claimed to be able to proceed with the application of its internal law (the aforementioned

¹¹ Which the author states that: "(...) a mandatory rule requiring that the defence be afforded the opportunity to challenge, in person, all witness whose evidence is produced by the prosecution, irrespective of its importance, would be to extreme (...)".

¹² In the same spirit and orientation see: ICTY, Prosecutor v. Kordić and Čerkez, IT-95-14/2-A, AC, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para 24 ha affermato che: "(...) the reliability of a hearsay statement is relevant to its admissibility, and not just to its weight (...)": the Chambers Appeal has affirmed in case: Prosecutor v. Aleksovski, IT-95-14/1-AR.73, AC, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 15349, that: "(...) the principle of fairness, expressed by the ECtHR and adopted by the Tribunal, (stating) that a conviction may not be based solely or in a decisive manner on the deposition of an individual whom the accused has had no opportunity to examine is not equivalent to the restriction that the material related to the acts and conduct of the accused is inadmissible except through "live" testimony is both wider and narrower in scope. On the one hand, "acts of conduct" of the accused have been interpreted extensively in the jurisprudence of the Tribunal. The scope of the principle expressed above, however, appears to cover more than just this material: it clearly applies to any "critical element" of the Prosecution case, that is, to any fact which is indispensable for a conviction (including those used as an aggravating circumstance in sentencing). These are, in fact, the findings that a trier of fact has to reach beyond reasonable doubt. It would run counter to the principles of fairness discussed above to allow a conviction based on evidence of this kind without sufficient corroboration (...) the scope of the Rule that sufficient corroboration is necessary has to be expanded to cover evidence beyond that relating to the acts and conduct of the accused *stricto sensu* (...)". In case Prosecutor v. Tadić, case No. IT-94-I-T. Decision on defence motion on hearsay of 5 August 1996, par. 8 was affirmed that: "(...) there is no prohibition on the admission of hearsay evidence. Under our Rules, specifically sub-Rule 89 (c) out of Court statements that are relevant and found to have probative value are admissible (...) in common law systems, evidence that has probative value is generally defined as evidence that tends to prove an issue (...) relevancy is often said to enquire implicitly some component of probative value (...) it appears that relevant evidence tending to prove an issue must have some component of reliability (...) in deciding or not hearsay evidence that has been objected to will be excluded the trial chamber will determine whether the proffered evidence is relevant and has probative value, focusing on its reliability (...)".

Criminal Justice Act 2003), without taking into account the rules established in Strasbourg (EMMERSON, ASHWORTH, MACDONALD, CHOO, SUMMERS, 2012, p. 606-608; JACKSON, SUMMERS, 2012; REDMAYNE, 2012, p. 283-284; SPENCER, 2014, p. 44ss; VOGLER, 2014, p. 181ss)¹³. The European judges immediately understood the gravity of this precedent, which risked putting the seal of the conventional system at serious risk, and therefore decided to listen to the opinions of the English Channel.

It seems difficult to imagine that ECtHR would have succeeded in promoting a rigid application of the letter “d” (LIAKOPOULOS, 2018), and once this awareness has been acquired, one can easily understand the rationale of the laborious exegetical work carried out on it, aimed at mitigating the otherwise severely contained content. In order to achieve this, the center of gravity of the issue has been sharply shifted from the admissibility of evidence to that of its assessment, although, as we shall see shortly, -at least until recently-the possibility that the mere admission of such proof provoked the iniquity of the procedure had not been completely abandoned.

The first step consisted in the manipulation of the conventional text: the faculty to question or have the witnesses questioned was downgraded by the absolute right of the accused-as appears in par. 3 of art. 6 ECHR-a “specific aspect of the right to a fair hearing set forth in paragraph 1” (CLAPHAM, 2016, p. 222ss)¹⁴, of which we simply take into account-like other profiles-in a broader judgment on the overall fairness of the procedure (TRECHSEL, 2005)¹⁵.

This defensive prerogative has thus become a balanced guarantee, prey

¹³ Its refers to: R. v. Horncastle (2009) UKSC 14, which is stated that: “(...) in these circumstances I have decided that it would not be right for this court to hold that the sole or decisive test should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. I believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason. In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case (...)”.

¹⁴ ECtHR, Al-Khawaja and Tahery v. The United Kingdom of 15 December 2011; Seton v. The United Kingdom of 31 March 2016.

¹⁵ ECtHR, Al-Khawaja and Tahery v. The United Kingdom of 15 December 2011, par. 118: “(...) the Court notes that the guarantees in paragraph 3 (d) of Article 6 are specific aspects of the right to a fair hearing set forth in paragraph 1 of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court’s primary concern under Article 6 par. 1 is to evaluate the overall fairness of the criminal proceedings (...)”. According to Trechsel which the author confirmed that: “(...) regrettably, the Court has held in a number of cases that although some of the minimum guarantees had not been complied with, an evaluation of the proceedings as a whole revealed that the trial had nevertheless been fair (...)”.

to the already cited method of global evaluation: in evaluating the “as a whole” procedure, the ECtHR has in fact the opportunity to take into consideration also interests further than those of the accused such as for example, the repression of crimes, or the protection of witnesses (EDWARDS, 2012, p. 29ss)¹⁶.

In other words, the classical rule, often declaimed, according to which the accused must be offered: “*une possibilité adéquate et suffisante de contester les témoignages à charge et d’en interroger les auteurs, soit au moment de leur déposition, soit à un stade ultérieur*”¹⁷ is not at all mandatory: if needs such as those mentioned above emerge, hearsay evidence can be used as evidence (HARRIS, O’BOYLE, WARBRICK, p. 483ss, CLAYTON, 2010, p. 186ss)¹⁸. However, the European courts have always tried to set some limits to this possibility of use, tracing a threshold, beyond which—regardless of the additional interest at stake—the right of defense would be limited in a manner incompatible with the dictates of article 6 ECHR (TRECHSEL, 2005, p. 312-317; SCHABAS, 2015, p. 1755ss; SPENCER, 2009)¹⁹. For some time, this limit consisted in the impossibility of using the statements made in a context without comparison as a single or decisive element for the sentence (JACKSON, SUMMERS, 2012, p. 339ss)²⁰.

Starting from the aforementioned sentence of the Grand Chamber of 2011, however, this safeguard has been remodeled: the judge can now base his decision on the established evidence, but must have been prepared “sufficient

¹⁶ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 101: “(...) Court’s primary concern under Article 6 par. 1 is to evaluate the overall fairness of the criminal proceedings (...) will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted (...) and, where necessary, to the rights of witnesses (...)”. In the same orientation in the case: *Al-Khawaja and Tahery v. The United Kingdom* of 15 December 2011, par. 118: “(...) the Court will look at the proceedings as a whole having regard to the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted (...)”.

¹⁷ The phrase was used in the case: *Blokhin v. Russia* of 14 November 2013, par. 161.

¹⁸ Harris and others noticed that: “with regard to trial proceedings neither the accused’s right to cross-examine witness against him in court nor his right to call defence witnesses is absolute or unlimited (...)”.

¹⁹ ECtHR, *Gani v. Spain* of 19 February 2013, which is stated that: “(...) all evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument. However, the use in evidence of statements obtained at the stage of the police inquiry and the judicial investigation is not in itself inconsistent with Article 6 par. 1 and 3 (d), provided that the rights of the defence have been respected (...)”. In the same spirit see: *Vronchenko v. Estonia* of 8 June 2013, par. 55.

²⁰ ECtHR, *Lucà v. Italy* of 27 February 2001, par. 40: “(...) 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 (...)”.

counterbalancing factors, including the existence of strong procedural safeguards, which permit a fair and proper assessment of the reliability of that evidence to take place” (DENNIS, 2012, p. 376-378; HARRIS, O’BOYLE, WARBRICK, 2014, p. 488ss; SPENCER, 2014, p. 60-62)²¹.

In addition, of course, for the defendant’s right to contest the admitted admission test²², they perform this function, for example, the presence of feedback²³, adequate direction to the jury²⁴, an analytical motivation²⁵, the simultaneous acquisition of the videocontration of the interview²⁶, or the fact that the statements in question have been made before a judge (BOIS-PEDAIN, 2012; LIAKOPOULOS, 2016)²⁷, or that, in any case, in the context of their assumption, the defense has been able to interact-perhaps even indirectly-with the registrant²⁸. Sometimes, here, one wonders whether the investigating authorities-aware of the subsequent impossibility of hearing the declarant-

²¹ ECtHR, Al-Khawaja and Tahery v. The United Kingdom of 15 December 2011, par. 161.

²² ECtHR, Horncastle and others v. The United Kingdom of 16 December 2014, par. 142; Sică v. Romania of 9 July 2013, par. 71; Damir Sibgatullin v. Russia of 24 April 2012, par. 57; Asatryan v. Armenia of 27 April 2017.

²³ ECtHR, Sică c. Romania of 9 July 2013, par. 76; Hümmer v. Germany of 19 June 2012, par. 49-50; Pesukic v. Switzerland of 6 December 2012, par. 48.

²⁴ ECtHR, Al-Khawaja and Tahery v. The United Kingdom of 15 December 2011, par. 157.

²⁵ ECtHR, Bobeş v. Romania of 9 July 2013, par. 46: “la Cour constate que les juridictions internes ont accordé aux dépositions de G.V. le même poids qu’à une déclaration faite devant un tribunal sans s’y référer au risque qu’il y avait à se fier à un témoignage livré par une personne n’ayant pas été contre-interrogée (...)”. In the same spirit see also the case: Nikolitsas v. Greece of 3 July 2014, par. 37 and Văduva v. Romania of 25 February 2014, par. 48.

²⁶ ECtHR, Schatschaschwili v. Germany of 15 December 2015, par. 127, which is stated that: “(...) an additional safeguard in that context may be to show, at the trial hearing, a video recording of the absent witness’s questioning at the investigation stage in order to allow the court, prosecution and defence to observe the witness’s demeanour under questioning and to form their own impression of his or her reliability (...)”. In the case: Blokhin v. Russia of 14 November 2013, par. 173 it’s affirmed that: “(...) les déclarations formulées par les témoins devant les autorités d’enquête n’ayant pas fait l’objet d’un enregistrement vidéo, ni le requérant ni ses juges n’ont pu observer le comportement des témoins pendant leur interrogatoire et se faire une opinion quant à leur fiabilité (...)”.

²⁷ ECtHR, Tseber v. Republic Czech of 22 November 2012, par. 61-62: “(...) 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 par. 1. 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 to the case (...)”.

²⁸ ECtHR, Scholer v. Germany of 18 December 2014, par. 60; Şandru v. Romania of 15 October 2013, par. 67; Vronchenko v. Estonia of 18 July 2013, par. 65.

could have arranged a confrontation between witness and defense during the investigations (HEFERNAN, 2016, p. 104ss)²⁹.

Next to this new and more permissive limit of use, however, the arrest itself *Al-Khawaja and Tahery v. The United Kingdom* had forged a preliminary eligibility limit. In fact, it was read in the judgment that “as a general rule, witnesses should give evidence during the trial and all reasonable efforts will be guaranteed to enquire if that absence is justified” (PRADEL, VARINARD, 2013); otherwise, “when no good reason has been shown for the failure to have the witness examined”³⁰, the ECtHR also feared the possibility of a direct infringement of the procedural fairness.

In practice, in order to be able to enjoy the favorable regime of use illustrated above-which ultimately allows a judgment to be based on the statements of a subject who, for various reasons, has never been brought before the defense-the judge the national team must have carried out every reasonable effort to allow the registrant’s examination to take place during the trial. Only if this had not been possible could the previous declarations be taken in place of the testimony.

The subsequent jurisprudence seemed to have received rather compactly the indications coming from the Grand Chamber³¹: if the reasons for the failure

²⁹ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 157, which is stated that: “(...) in such circumstances, it is vital for the determination of the fairness of the trial as a whole to ascertain whether the authorities, at the time of the witness hearing at the investigation stage, proceeded on the assumption that the witness would not be heard at the trial. Where the investigating authorities took the reasonable view that the witness concerned would not be examined at the hearing of the trial court, it is essential for the defence to have been given an opportunity to put questions to the witness at the investigation stage (...)”. in the same orientation see: *Vronchenko v. Estonia* of 18 July 2013, par. 61. However, it can be noted that this profile does not have much to do with the compensating guarantees of the acquisition of a declaratory test formed in a context devoid of the defensive participation. The failure to carry out an adversarial procedure in the investigative phase should rather be seen as a direct failure to comply with the primary duty of the Member States-which European jurisprudence constantly cites but then often neglects-to offer the accused the opportunity to confront the accuser. Hefernan, commented that: “(...) the sole or decisive evidence rule and the sufficient counterbalancing factors test lead us into the complex and potentially fraught terrain of the significance of the contested evidence: its relationship with the other items of evidence and its strategic importance in the prosecutorial arsenal (...) the ECtHR’s resurgence of rules allowing corroborating evidence to determine the admissibility of hearsay “bucks a general trend away from identifying and evaluating the strength of independent supportive evidence (...) in practice they will operate as “flip-sides of the same coin” (...) the greater degree of decisiveness of the evidence, the less likely that corroborating evidence will be present; on the other hand, the stronger the corroboration, the less likely it will be that the initial evidence is decisive (...) ECtHR’s confrontation right remains in a state of considerable uncertainty and predicts “continued critical reflection on the disputed wisdom of the ECtHR’s doctrinal compromise embodied in its recent jurisprudence (...) it invites renewed focus on our contemporary understanding of fairness in systems of criminal justice and the role of the ECtHR in ensuring its protection (...)”.

³⁰ ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 15 December 2011.

³¹ ECtHR, *Efendiyev v. Azerbaijan* of 18 December 2014, par. 47: “(...) therefore, taking into consideration that no good reason has been shown for the failure to have R.M. examined, the Court finds that the

to testify were not sufficiently robust, the Strasbourg judges were inclined to declare the iniquity of the procedure, often without proceeding to subsequent checks on the weight attributed to the declarative test acquired and the presence of the aforementioned countervailing guarantees³². The indication in principle was indeed that “when the admission of a witness statement into a trial of the last resort” (COSTA, 2017, PRADEL, VARINARD, 2013)³³. Thus, for example, in case of unavailability of the witness, the ECtHR checked whether the national judicial authorities had done “*tout ce que la on pouvait raisonnablement attendre d’elles pour localiser le témoin concerné et si elles n’ont pas manqué des diligence dans leurs tentatives d’assurer sa présence à la barre*”³⁴.

In the case of anonymous witnesses³⁵, who had not been heard in court to keep their identity hidden, there was a real need for such caution³⁶; similar

applicant’s defence rights were limited to an extent incompatible with the guarantees of a fair trial (...); *Nikolitsas v. Greece* of 3 July 2014, par. 35: “(...) or, de l’avis de la Cour, le seul fait que ces témoins résidaient à l’étranger ne saurait en soi constituer une impossibilité absolue de recueillir leurs témoignages en présence de la défense. Par conséquent, aucun “motif sérieux” n’est invoqué pour justifier ce manquement aux droits de la défense. Conformément à la jurisprudence de la Cour, cet élément suffit, à lui seul, pour constater la violation de l’article 6 parr. 1 et 3 d) de la Convention (...)”; *Rudnichenko v. Ukraine* of 11 June 2013, par. 109: “(...) the foregoing considerations are sufficient to enable the Court to conclude that there were no reasons, let alone good reasons, for the restriction of the applicant’s right to obtain the examination of the witness whose testimony had been used for his conviction. In these circumstances, the Court does not consider it necessary to proceed with the second part of the test as to whether the applicant’s conviction was based solely or to a decisive degree on B’s depositions (...)”. See also: *Colac v. Romania* of 10 February 2010, par. 50; *Gabrielyan v. Armenia* of 10 April 2012, parr. 84-86. However, there have been cases in which, while noting the absence of a good reason for the lack of enforcement of the witness in court and for the simultaneous acquisition of its previous statements, the Court has nevertheless wanted to proceed with the examination of the case in order to verify the overall equity. In this sense see: *Balta e Demir v. Turkey* of 23 June 2015; *Văduva v. Romania* of 25 February 2014; *Șandru and others v. Romania* of 15 October 2013.

³² ECtHR, *Lučić v. Croatia* of 27 February 2014, par. 73.

³³ ECtHR, *Tseber v. Republic Czech* of 22 November 2012, par. 48.

³⁴ ECtHR, *Scholer v. Germany* of 18 December 2014, parr. 52-57; *Pesukic v. Switzerland* of 6 December 2012, parr. 46-47.

³⁵ In case *Kok v. Netherlands* of 4 July 2000 the ECtHR found that the admission of the declarant’s unchallenged hearsay statements did not violate the ECHR because there was “considerable alternative evidence” of defendant’s guilt. Likewise, in *Verdam v. Netherlands* of 31 December 1999 the ECtHR found that the admission of the hearsay statements of sexual assault victims did not violate the defendant’s right to a fair trial because the details in the hearsay statements were corroborated by other evidence. Additionally, in *Ferrantelli v. Italy* of 7 August 1996 the ECtHR found that the ECHR was not violated despite “the impossibility of examining or having examined before his death (...) the prosecution’s witness,” because the appellate court “carried out a detailed analysis of the prosecution witness’s statements and found them to be corroborated by a series of other items of evidence (...)”. For details see: B. DE WILDE, A fundamental review of the ECHR right to examine witnesses in criminal cases, in *The International Journal Evidence & Proof*, 17 (2), 2013, p. 157ss: “(...) if the defense could not examine a witness whose statement was the sole or decisive evidence of the charges, the ECtHR consistently found there to have been a breach of the right to examine witnesses (...)”.

³⁶ ECtHR, *Vronchenko v. Estonia* of 18 July 2013, par. 56; *Gani v. Spain* of 19 February 2013, par. 47.

checks were also carried out in cases where the trial deposition had not taken place to protect victims of sexual offenses³⁷, or because the registrants appeared for various intimidated cases³⁸. If, on the other hand, the witness was unable to appear in court for infirmity or for the remoteness of the judicial seat, one wondered about the possible course of deposition using alternative methods, for example, by videoconference, or in a different place from the courtroom³⁹. In the *Moumen v. Italy* case of June 23, 2016 the ECtHR has recognized the violation of the right to the tests and the lack of texts that have declared their absence. According to the Court “(...) the unilateral declarations constituted, in fact, if anything, a mere comparison with the deposition of the victim, already heard during the probationary incident, the analysis of the trial also revealed the presence of sufficient counterbalancing factors, to compensate for defensive difficulties”.

In the *Cevat Soysal judgment v. Turkey* of 23 September 2014 the ECtHR has recognized violation of counter-examination, parity of weapons discovery of the indictments and the relevance of superfluous evidence. In the *Mavric v. Slovenia* of 15 May 2014 the ECtHR claimed violation of the decisive and counter-examination evidence during the procedural stage where the lack of communication of the date of the hearing and the hearing of the texts resulted in the absence of the counter examination by the accused and his own condemnation. Same spirit and content about also in *Matytsina v. Russia* case of 27 March 2014 which was affirmed the lack of participation of texts that compromised the overall fairness of the proceeding and the general principle of the adversarial. In the *Lucic v. Croatia* case of 28 February 2014 the ECtHR has affirmed the violation of the fair trial based on the lack of counter examination and the reading of pre-conscientious statements made by texts absent for the trial representing a defensive deficit determined where the fault “hits” according to the judges of Strasbourg the accused and his own defender who gave up asking the victim during the investigation. In the *Gani v. Spain* case of 19 February 2013 the ECtHR affirmed the violation of the assumption of the testimonial test, the objective impossibility of the counter examination during the hearing, the lack of texts and the protection of the vulnerable declarer accepting that: “(...) objective impossibility of examining the victim of the offense has not threatened the right to defend the insured person (...)” (LONDRAS, DZEHTSIAROU, 2018).

In *Göc v. Turkey* case of 8 November 2000, the ECtHR recognized that:

³⁷ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* of 15 December 2011, par. 159. J.P. COSTA, *La Cour européenne des droits de l’homme. Des juges pour la liberté*, op. cit.

³⁸ ECtHR, *Bobeş v. Romania* of 9 July 2013, parr. 39-43.

³⁹ ECtHR, *Horncastle and others v. The United Kingdom* of 16 December 2014, par. 140.

“(…) as to the argument that the applicant could have consulted the case file at the Court of Cassation and obtained a copy of the principal public prosecutor’s opinion, the Court is of the view that this of itself is not a sufficient safeguard to censure the applicant’s right to an adversarial procedure. In its view, and as a matter of fairness, it was incumbent (….) to inform the applicant that the opinion had been filed and that he could, if he so wished, comment on it in writing. It appears to the Court that this requirement is not secured in domestic law. The government have contended that the applicant’s lawyer should have known that consultation of the case file was possible as a matter of practice (….) considers that to require the applicant’s lawyer to take the initiative and inform himself periodically on whether any new elements have been included in the case file could amount to imposing a disproportionate burden on him and would not necessarily have guaranteed a real opportunity to comment of the opinion since he was never made aware of the timetable for the processing of the appeal (….)” (COSTA, 2017)⁴⁰.

In *Constantin v. Romania* case of 12 April 2011 the ECtHR affirmed that: “(…) damaging these rights the redevelopment of the malicious offense of abuse of authority against the public interest in the negligence of negligence in the performance of functions, since during the trial the psychological element had not passed through the contradictory” (COSTA, 2017).

According to our opinion the use of hearsay or anonymous evidence, would seem to indicate that for Strasbourg counter balancing epistemic disadvantage is not the only concern. The principle appears to limit the extent to which compensatory measures for the handicaps to the defence may go. It has been argued elsewhere that the introduction of this principle suggests that the European court conceives of the cross-examination of witnesses as having a non-consequentialist process value, in addition to its instrumental value for determining the reliability of witness evidence. This process value appears to be founded on the importance of providing the defendant with an opportunity to test evidence that may be decisive; it is a non-epistemic consideration in the sense that the opportunity should be provided irrespective of whether the evidence in question carries its own guarantees of reliability, or whether the counterbalancing measures are sufficient to permit the reliability of the evidence to be assessed safely.

Only in the case in which the person to be heard had died (MÜLLER, 2017)⁴¹, or had exercised the faculty granted by the law not to reply (MÜLLER, 2017), the

⁴⁰ ECtHR, *Göç v. Turkey* of 8 November 2000, par. 57.

⁴¹ ECtHR, *Sievert v. Germany* of 19 June 2012, par. 60; *Vigden v. Netherlands* of 10 June 2012, par. 42.

existence of the aforementioned “good reason” was recognized with particular generosity.

Before the arrest *Al-Khawaja and Tahery v. The United Kingdom*, on the other hand, did not carry out this preliminary check-up: almost always, it was confined to checking whether the defendant had been granted, at any time during the procedure, the possibility of “*de contester les témoignages à charge et d’en interroger les auteurs*”⁴² and then, if this had not happened, the weight of previous declarations of the latter for the purposes of condemnation was probed (MOTOC, ZIEMETE, 2016, p. 478ss)⁴³. After the attenuation of the “sole or decisive rule” (DE LONDRAS, DZEHTSIAROU, 2018), in essence, the ECtHR seemed to have wanted to recover during the admission phase, as granted at the time of use and the trial-venue typical of the assumption of declarative tests-had acquired a relief until then unpublished.

This was the state of the art until the new intervention of the Grand Chamber of 15 December 2015, with the judgment *Schatschaschwili v. Germany*. Appealed by an appellant, whose complaints about the failed hearing in court of the two victims had been rejected by the fifth section, the ECtHR in its most authoritative composition, seems to have gone well beyond the resolution of the specific case, coming to disavow that part majority of its own jurisprudence which had, until then, rigorously conducted the above-mentioned test on the existence of valid reasons for the omission of the witness examination. Unlike ECtHR’s test, the rule put forth should include only procedural safeguards as counterbalancing factors, with the critical question being whether the defendant was ever afforded an opportunity to question the witness. The right to confrontation is a procedural

⁴²In case *Horncastle and others v. The United Kingdom* of 30 January 2013 the ECtHR affirmed that: “were convicted of causing grievous bodily harm, with intent,” to a man named (...) although pre-trial confrontations between witnesses and defendants can provide opportunities for confrontation in civil law countries, they are not practical in common law countries where police officers, not judicial officers, conduct the investigations (...)”. The ECtHR’s sole or decisive rule for “producing a paradox,” in that it allows the introduction of evidence if it is peripheral, but not decisive. Courts will experience great difficulty applying the sole or decisive rule and, as such, the only proper way to deal with this rule is to exclude all hearsay evidence.

⁴³In this sense see from the jurisprudence of the ECtHR: *Lucà v. Italy* of 27 February 2011; *Kononenko v. Russia* of 17 February 2011; *Kornev and Karpenko v. Ukraine* of 21 October 2010; *Ogaristi v. Italy* of 18 May 2010; *Nehyet Günay and others v. Turkey* of 21 October 2008; *Kovač v. Croatia* of 12 July 2007; *Carta v. Italy* of 20 April 2006; *Bracci v. Italy* of 13 October 2005; *S.N. v. Svezia* of 2 July 2000. However, there were no shortcomings-even before the arrest of *Al-Khawaja and Tahery v. The United Kingdom*-in which the ECtHR recognized a violation of Article 6 ECHR on the sole ground that adequate efforts had not been made to secure the examination of the witness. See for example: *Pello v. Estonia* of 12 April 2007, parr. 34-35), or because the reasons given by the national court to support the choice not to make the registrant appear at the hearing had proved insufficient, as we can see in the case: *Van Mechelen and others v. Netherlands* of 23 April 1997, parr. 61-62.

right that should not be diminished by the substantive evidence present in the case. Although criminal pre-trial procedures in the United Kingdom (and in U.S) generally do not include the type of judicial investigatory hearings found in many civil law European countries, it is possible to preserve testimony by affording the defendant an opportunity to question a witness at a pre-trial deposition. In cases involving vulnerable witnesses, or where law enforcement fears a witness will not be available at the time of trial, courts can make use of pre-trial depositions, which can provide defendants an opportunity to question the witness.

As far as it is concerned here, we basically wondered if we really “lack a concern (first step of the Al-Khawaja test) entails, by itself, a breach of article 6 §§ 1 and 3 (d) of the Convention, without being necessary to examine the second and third steps of the Al-Khawaja test”⁴⁴.

To deny the necessary automaticity between the negative outcome of the “first step” and the recognition of a violation of art. 6 of the ECHR, the Grand Chamber reiterated the same argument he had used, exactly four years earlier, to mitigate the “single or decisive test rule” (MÜLLER, 2017): if we read in sentence the purpose of arrest *Al-Khawaja and Tahery v. The United Kingdom* was that of “abandon an indiscriminate rule to the whole” (FIKFAK, 2015)⁴⁵, it would be paradoxical to accept the creation of a rule with similar effects in relation to the “lack of a good reason for a witness’s non-attendance”⁴⁶.

The reasoning was therefore rather simple: once denied that the decisive use of the previous statements is ex-*ipso facto* sufficient to trigger the iniquity of the trial, it would make no sense to draw the same consequence from the mere fact that the failure to discuss the testimony of the witness it is not supported by solid motivations. The Grand Chamber has tried to detect a presumed illogicality in its previous arrest, which was affirmed at one point, when it was denied in another. Based on this premise, the conclusion was therefore rather obvious: although it represents “a very important factor to be weighed in the balance when assessing the overall fairness of a trial”, “the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial” (CHOO, 2013, p. 80-84); it is true that this is a profile to be investigated, as a rule⁴⁷, “preliminarily”, but only “in a temporal sense”, the outcome of which

⁴⁴ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 111.

⁴⁵ As we can see in the same spirit in the case: *Dadayan v. Armenia* of 7 September 2018.

⁴⁶ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 112; *Boyets v. Ukraine* of 30 January 2018.

⁴⁷ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 111: “it may therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proves to be particularly conclusive as to either the fairness or the unfairness of the proceedings (...)”.

does not prevent the continuation of the trial, in search of an “overall fairness of the trial”⁴⁸.

3 (FOLLOWS) FROM AL-KHAWAJA AND TAHERY V. THE UNITED KINGDOM TO SCHATSCASCHWILI V. GERMANY AND BOYETS V. UKRAINE

The change brought about by this new Grand Chamber arrest seems to be quite substantial. The *Al-Khawaja and Tahery judgment v. United Kingdom*-more or less consciously-had inaugurated the development of a new rule of exclusion, which, thanks to the contribution of the subsequent jurisprudence, had assumed a form that can be summarized as follows: the statements made by a person whose defense has never been able to interrogate or ask questions, unless there are “valid reasons” to omit the debates’ examination (SPENCER, 2014)⁴⁹.

Only once justifiably admitted, in fact, such declarations could possibly be used as decisive proof, albeit with the limits of use mentioned above, to guarantee the rights of defense of the accused. Now this exclusion rule is gone. “Good reasons” are no longer an essential condition for the fair admission of previous declarations and are only one of the many factors that the ECtHR will have to take into account in the tripartite evaluation of the overall fairness of the process. There are many more “risks” of this new structure.

The trial could lose that privileged role that it had recently conquered, returning to being only one of the places in which the confrontation between the accused and the accuser can indifferently take place; secondly, if we keep in mind the fact that judgment is often the only procedural moment in which the defense has the opportunity to question -or to ask in his presence-the witnesses against him, the acquisition of untested evidence it could undergo a strong increase; finally, it is likely that the ECtHR will return to behaving as it did before the arrest of December 15, 2011, i.e. focusing immediately on the effects of admitting evidence, rather than focusing first on the reasons for admission per se.

It is perhaps too early to say, but according to our opinion it seems that we wanted to make a leap back four years and it is in fact that, from now on, the national judicial authorities will be entitled to acquire the previous declarations,

⁴⁸ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* of 11 December 2011, par. 120, which is affirmed that: “(...) the requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 par. 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined (...)”.

⁴⁹ ECtHR, *Zadumov v. Russia* of 12 December 2017. SPENCER, 2014.

replacing of the “fresh” testimony, without giving any particular motivation, or taking any reasonably expedient initiative to ensure the participation of the witness in the judgment. The process fairness can in fact also be recovered elsewhere. The reasons expressly put forward in support of this turnaround do not seem entirely satisfactory, because as stated in the *Schatschaschwili v. Germany* sentence the previous orientation was not exempt from imperfections: if the previous statements, although admitted without “*motifs sérieux*”, were not then used-or at least their use remained marginal-a declaration of iniquity could in fact manifest an excessive intransigence⁵⁰.

Well known, however, how this justification can be invoked exclusively in relation to those systems in which the sentence is always motivated; only in this case, in fact, it seems possible to carefully check how the evidence was used, although nothing assures that the judge has completely ignored the evidence not mentioned in his arguments. Whereas, on the other hand, the verdict is unjustified, or scarcely motivated, a declaratory test admitted without a valid reason can be decisive for the sentence, without it being always easy to realize it. For these systems, in essence, the preservation of some form of preventive protection was certainly desirable⁵¹.

On the other hand, to better consider, the concerns, which have more strongly led the ECtHR to promote this further reduction in protection, appear to be quite different from those clearly manifested. This probative limit stood in stark contrast to the classic statement by the ECtHR, according to which “the admissibility of evidence is a matter for regulation by the national law and the Court of Justice the criminal proceedings”⁵².

Although the ample parameter of the “*motifs sérieux*” (GOSS, 2014, p. 61ss)⁵³, which ought obligatorily to support the lack of the trial deposition, granted an ample margin of discretion, it cannot be denied that the European judges had established in a matter of which they formally have always supported not to deal with: to affirm that the admission of a trial, in the absence of certain presuppositions, implies the iniquity of the trial is not very different from saying that his admission, in the absence of such hypotheses, is forbidden; in the latter case, the rule is simply stated, but the sanction is not specified, whereas, in the

⁵⁰ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 112.

⁵¹ ECtHR, *Al-Khawaja and Tahery v. The United Kingdom* of 11 December 2011.

⁵² The expression is used in the case: *Prăjină v. Romania* of 7 January 2014, par. 49.

⁵³ According to Goss: “(...) the dichotomy that determining whether certain types of evidence are admissible is not the role of the Court, but determining the fairness of the proceedings as a whole is the role of the Court (...) obscures the possibility that a ruling on the fairness of proceedings might, implicitly or explicitly, involve ruling on admissibility (...)”.

first hypothesis, the prohibition remains implied and the consequence of its violation (iniquity of the trial) is directly specified. Even beyond this important inconsistency between form and substance of the reasoning of the ECtHR, the delicate area of the law of trials in which this rule of exclusion was going to graft was even more problematic: it is indeed just the case of remembering-as already more sometimes emphasized-that the hearsay rule suffers from a clear recessive phase, even in those systems that most used it.

It is not a coincidence that the Grand Chamber, in the ruling in question, has dramatically emphasized the necessity of “having regard to substantial differences in legal systems and procedures, including different approaches to the admissibility of evidence in criminal trials”⁵⁴, reaffirming, however, that the task of the judges of the Convention is not “to examine the issues raised by the case”⁵⁵.

In all likelihood, we began to fear the onset of a new “Horncastle case” and therefore decided to play in advance, in order to avoid new and dangerous tears with some national system, which would have forced the ECtHR to a-surely less authoritative-posthumous compromise. What was the price of this attitude, though? That is, what is left of the letter. d? The impression is that of that granitic rule, which is read in the text of art. 6 ECHR, very little has remained. The prerogative of the accused to “question or have the witnesses questioned” (GOSS, 2014) has undergone a complete metamorphosis. Instead of guaranteeing confrontation with the accuser, the European judges merely check that its non-implementation does not cause an “unequal” compression of the underlying right of defense.

In other words, the criterion of “actual prejudice” has shown itself, in this context, in its maximum expansion: even the total non-observance of the conventional rule remains without sanction, if, after all, the defendant has not suffered an unreasonable downside. It does not matter, therefore, if this comparison does not take place, nor does it affect the specific reasons why this did not happen; what counts is that the accused was otherwise placed in the conditions to counter the accusations and proceedings. “Similar statements were already present in the arrest of the Grand Chamber of 2011, although, in that case, specific reference had been made to the regulation English, then examined”⁵⁶.

⁵⁴ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 108.

⁵⁵ ECtHR, *Schatschaschwili v. Germany* of 15 December 2015, par. 109, “(...) when examining cases, the Court is of course mindful of the differences between the legal systems of the Contracting Parties to the Convention when it comes to matters such as the admission of evidence of an absent witness and the corresponding need for safeguards to ensure the fairness (...)”.

⁵⁶ ECtHR, *Al-Khawaja and Tahery v. United Kingdom* of 11 December 2011, par. 126, which is

4 (FOLLOWS) BAD CHARACTER AND OPINION EVIDENCE

In addition to the provisions that require the exclusion of declaratory evidence formed outside the hearing, the examination of the legal systems of England, Italy, Germany and France has led to the illustration of other exclusionary rules aimed at ensuring-at least in the intentions-a better reconstruction of the facts.

While the hearsay rule is traditionally aimed at the extraction of unreliable elements, which-it is feared-could be attributed an erroneous demonstration value, several institutions prohibit the use as evidence of some information, considered potentially able to undermine the objectivity of the judge and generate undue prejudices. This refers in particular to the criminal record of the accused and to his life behaviors- the so-called bad character-, as well as to the personal evaluations of the witnesses, manifested during the deposition-the opinion evidence.

Curiously, however, contrary to what happens in some national systems, the European courts do not seem to have taken into consideration the possibility of promoting at least a limited use of such data. As regards, first of all, the bad character, already the Commission, in 1965, preferred not to express itself on the question. The appellant complained that the prosecutor had been allowed to explain in detail the details of his previous convictions to the jurors. The Strasbourg authority called to assess the fairness of such a procedure. He merely believed it

[...] necessary to take into consideration the practice in different countries which are members of the Council of Europe; whereas it is clear that in a number of these countries information as to previous convictions is regularly given during the trial before the court has reached a decision as to the guilt of an accused; whereas the Commission is not prepared to consider such a procedure as violating any provision of article 6 (art. 6) of the Convention, not even in cases where a jury is to decide on the guilt of an accused⁵⁷.

In essence, since, in most of the ECHR member states, this type of information is usually provided to the judge, the Commission did not consider it appropriate to enter into the merits of the problem: rather than a legitimization of that practice, it seemed a non possumus. Subsequently, things do not seem to have changed at all.

affirmed that: "it is not the Court's task to consider the operation of the common-law rule against hearsay in abstracto or to consider generally whether the exceptions to that rule which now exist in English criminal law are compatible with the Convention. As the Court has reiterated (...) article 6 does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (...)".

⁵⁷ ECtHR, X. v. Denmark of 14 December 1965.

The ECtHR-during the illustration of the trial case-explicitly specifies that the national judge, to make his decision, has relied on evidence of bad character and, in particular, the previous conviction, without then that circumstance comes in any way stigmatized⁵⁸.

In one case, in which, on the other hand, the appellant had expressly complained about the violation of art. 6 ECHR, due to the “admission in the main trial of evidence and to its bad character” (COSTA, 2017)⁵⁹, the issue was solved simply by stating that “the applicant’s submission was left undeveloped and unsubstantiated”⁶⁰. In a case in which the criminal convictions of the accused were read by the judge while examining a witness, no iniquity was found, as nothing suggested that this gesture was aimed at “exert pressure on witness”⁶¹. Therefore, there seems to be no doubt as to whether the ECtHR admits the use of bad character tests, without this implying specific suspicion of iniquity (SPENCER, 2009, p. 14ss)⁶². The same can be said of the opinion evidence.

⁵⁸ ECtHR, *Horncastle and others v. The United Kingdom* of 16 December 2014, par. 24; *Hanif and Khan v. The United Kingdom* of 20 December 2011, par. 15; *Sheremetov v. Bulgaria* of 22 May 2008, par. 25; *Yordanov v. Bulgaria* of 10 August 2006, par. 14; *Unterpertinger v. Austria* of 24 November 1986, par. 23; *Windisch v. Austria* of 27 September 1990, the ECtHR found that: “(...) the use of anonymous witnesses foreclosed any opportunity for the defendants to ever confront those witnesses, either during the investigation or at any subsequent hearings, and therefore deprived the defendants of their right to a fair trial. In case *Kostovski v. Netherlands* of 20 November 1989, par. 18 was commented that: “(...) Article 6(3)(d) is generally violated when statements are admitted as evidence in the absence of the cross-examination of their authors during the trial (...) the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument (...)”, as we can see in the case: *Doorson v. Netherlands* of 26 March 1986: “(...) established that the handicaps under which the defense laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities “(...) if a lawyer’s participation is deemed essential to the fair trial of somebody who has one either at hand or in mind, why should it be thought inessential to the fair trial of a man with nobody to whom to turn because he cannot afford the expense? The result of no lawyer is the same in both situations, after all, the layman being left to defend himself. And his handicap then is just the same, whether he is a wealthy layman denied an opportunity that he wanted to employ a lawyer whom he could have found or a poor one who never sought the opportunity because it was doomed from the start to prove futile. The answer to each question, I roundly suggest, is that there really is none (...) Article 6 does not explicitly require the interests of witness in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (privacy) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organize their criminal proceedings in such a way that those interests are not unjustifiably imperiled (...)”.

⁵⁹ ECtHR, *Panovits v. Cyprus* of 11 December 2008.

⁶⁰ ECtHR, *Panovits v. Cyprus* of 11 December 2008, parr. 87-88.

⁶¹ ECtHR, *Sazonov v. Russia* of 1st December 2015, par. 41.

⁶² Which is stated that: il “(...) contains no suggestion that admitting evidence of the defendant’s bad character is contrary to the notion of a fair trial (...)”.

In practice, in the *Donohoe v. Ireland* case the judges of Innsbruck considered respectful of art. 6 ECHR a criminal proceeding in which the conviction was also founded-although not exclusively-on the opinion evidence (which they also call “belief evidence”) of a witness, who, moreover, had formed his own conviction through information “Privileged”, which were not then revealed to the accused⁶³. Furthermore, not even the use of appraisals concerning the applicant’s ability and tendency to commit delinquency seems to have been considered a source of possible injury to fairness⁶⁴.

At this point, a question is obligatory: why has the Court of Strasbourg elaborated a very copious jurisprudence in the matter of hearsay evidence and instead appears to have been substantially disinterested in the evidence of bad character and opinion?

The reasons are probably three. First of all,-as the Commission has well pointed out, although specifically in relation to the bad character alone -these are probative limits that do not enjoy unanimous appreciation in the legal systems. It is true that, in many contexts, even the hearsay rule does not apply effectively; nevertheless, it cannot be denied that a certain sensitivity towards the values of orality, of immediacy and of the contradictory is in any case quite widespread, so that the intervention of the ECtHR, in this last area, is more easily tolerated. To put it differently, to this day, it might seem easier to ask the French to limit the use of the extradibattimental declaratory evidence, which imposes the renunciation of the *enquête de personnalité*, or the traditional interrogation of the accused on his previous convictions. Secondly, it is ECHR itself that explicitly requires some protection for the right to confront the accuser and this circumstance could not be overlooked by the Strasbourg judges; the other two exclusionary rules mentioned above do not seem to be able to boast of a specific conventional engagement and could at most find a basis in the multifaceted notion of fairness, which the European jurisprudence has filled with the most varied contents. The third reason, however, is perhaps the diriment. The dialectical method in the formation of the declarative tests, typical of the forum, in fact plays two functions, certainly connected, but still clearly distinguishable: on the one hand, it is an instrument of the process, which tends to ensure the successful outcome of the facts, in view of the search for truth (WEIGEND, 2011-2012, p. 390ss); on the other hand, it constitutes a subjective right of the accused, an essential explication of the right to defend himself against the accusations made by others against him.

⁶³ ECtHR, *Donohoe v. Ireland* of 12 December 2013, par. 73-87

⁶⁴ ECtHR, *H.W. v. Germany* of 19 September 2013, par. 8; *Rangelov v. Germany* of 22 March 2012, par. 9; *B. v. Germany* of 19 April 2012, par. 15.

Between these two “souls”, the judges of Strasbourg seem to be mainly interested in the second: as we have seen, in fact, according to the latter, it is not so important, in itself, an effective confrontation with the accuser; essential condition of fairness is only the respect of the defendant’s right to defense, even if exercised in another way.

This is why the exclusionary rules relating to bad character and opinion tests are not considered worthy of protection in view of the realization of a “fair” process; they, in themselves, mainly integrate the first of the two functions mentioned above, in the sense that they represent in the first instance “objective guarantees” (GOSS, 2014) of the process, designed primarily to favor an objective factual reconstruction.

In all likelihood, the ECtHR would be willing to intervene in this area, only if, in the single case, the right to defense was actually damaged: one might think, for example, of the case where it is denied imputed the opportunity to respond to the opinion of the witness, or to make their own considerations on the criminal record, or the sentence is based solely on those elements. In essence, it seems to understand that the Innsbruck judges prefer to keep away from complex epistemological questions about the best method of achieving the truth. The important thing is that the choices of the legal systems and their courts do not negatively affect the defendant’s prerogatives; only in the latter case, in fact, the process will risk to be declared “unfair” (GOSS, 2014).

CONCLUSION

It seems that it can be definitively stated that-both at the domestic level and in the supranational context-a strong tendency towards the least possible sacrifice of the relevant information is leading to the constant erosion of the exclusionary rule.

The access points to the court file are often governed by the sole discretion of the judge, whose choices frequently seem to be based on the preservation of evidence. Thus, the French nullities only take place following an assessment of the existence of an “*atteinte aux intérêts de la partie*” (articles 171 and 802) (LIAKOPOULOS, 2016); in Germany, the identification of purchase bans is carried out through scrupulous balancing of the interests at stake; moreover, in substance, the English system seems now inclined to rely on a single rule of exclusionary discretion, based on the weighting casuistry of the values contained in the multifaceted notion of fairness.

In some respects, the Italian code has instead seemed to go against the trend: the prohibition to read the previous declarations and the copious cases

of special uselessness represent examples of rigid and compulsory probation exclusion, which avoids any subjective evaluation. However, as we have seen, the attribution to the judge of the task of recognizing “the prohibitions established by the law” (GOSS, 2014) allows ample room for maneuver and it is precisely in this context that appreciation values similar to those achieved within the other three systems have examined. For its part, the ECtHR seems to avoid interfering in these delicate internal balances, so as not to ever lose the opportunity to reiterate its neutrality with respect to the issue of admissibility. The judges of the ECHR, in fact, -apart from some rare encroachment- try to turn their attention elsewhere: the prohibition of use, the “sole or decisive rule” and the obligation to obtain feedback are -in order of severity- the tools through which the demonstrative effectiveness of a test is usually harnessed. In any case, the effects attributed to the non-observance of conventionally protected rights often appear to be at similar or even lower levels compared to national ones.

Just think of the jurisprudence relating to art. 3 ECHR, in cases where the object of the dispute is real evidence; to the balancing tests carried out in the hypothesis of violation of the privilege against self-incrimination; or to the generous treatment of material acquired in violation of the “right to respect for private life” (COVIC, JACKSON, 2016, pp 1-17)⁶⁵. Particularly significant in this

⁶⁵ In case *Gäfgen v. Germany* of 6 July 2010 the ECtHR examined the issue of the use of evidence: “(...) obtained as a result of inhuman and degrading treatment applied to the applicant in that case (...) the right to fair trial may be breached if the use of evidence obtained in breach of Article 3 had impact on the defendant’s conviction or sentence (...) a causal link between the prohibited treatment and the conviction and sentence in respect of the impugned evidence. If that link is broken by additional evidence, then the impact of the impugned evidence on the conviction and sentence of the applicant is reduced (...) it necessary for national courts to restore or make an attempt to restore the situation in the proceedings as it was before the treatment in breach of Article 3 occurred (...)”. In case *El Haski v. Belgium* of 27 September 2012, the ECtHR clarified: “(...) its stance on the use of evidence obtained through treatment contrary to Article 3 (...) the use of statements obtained through treatment which is contrary to Article 3, no matter if it is qualified as torture, inhuman and/or degrading treatment, would render proceedings to be unfair as a whole (...) if real evidence is obtained through treatment contrary to Article 3, standards are a little bit different. If the treatment in question amounts to torture, then the use of real evidence always renders proceedings unfair as a whole (...) the treatment is qualified as inhuman and/or degrading treatment (...) if the proceedings are unfair if the use of such evidence had influence on the outcome of the proceedings (...) if “real risk” that the evidence obtained through treatment which is contrary to Article 3 persists, and national courts did not take steps to ensure that there was no such treatment in obtaining evidence, the proceedings were unfair as a whole and consequently resulted in a violation of Article 6 (...)”. In case *Schenk v. Switzerland* of 12 July 1998, the ECtHR singled out two factors which are important for examination of whether the use of evidence obtained in breach of Article 8 deprived the applicant of the right to a fair trial: “(...) these two factors are: a) possibility to challenge the admission of evidence in question; b) whether there was other evidence on which the conviction was based (...)”. The ECtHR departed from this standard in the case of *Khan v. The United Kingdom* of 12 May 2000, which the evidence: “(...) was obtained contrary to Article 8 was the only evidence against the applicant; moreover, it was very strong evidence which formed the basis for the conviction (...) there was no violation of right to a fair trial because the applicant had

sense are also different setbacks-especially in the matter of hearsay evidence-and the increasingly frequent appearance of public interest in the repression of crimes among the protagonists of the screening of fairness. Little or nothing has then added, compared to what was established in Strasbourg, the timid directives on the procedural rights of the accused, which have been worked out in the European Union up to now. Designed with the intention of achieving positive transposition and the further evolution of conventional guarantees, these regulatory acts have ended up constituting-at least as regards probative sanctions-an opaque reflection: in some, generic references to respect for fairness have taken the place of the much more incisive evaluation criteria carved in the Strasbourg jurisprudence; in others, on the other hand, the question was ignored, as if the risk that the non-observance of Euro-EU provisions could easily be converted into mere internal irregularities was almost ignored.

Ultimately, the “European criminal procedure” is still based, fundamentally, on the limits of use set by the judges of the ECHR, thus leaving always unaffected the entry of the evidence in the process. Through a series of restrictions based on the concrete situation, the power to evaluate them is harnessed, so as to reduce the dispersion of cognitive data to the minimum necessary. The proof therefore remains always usable in favor and, often, also against the accused, although only together with other elements, or as a support for the latter. The most recent Euroritarian legislative developments however make a final clarification appropriate. These are minimum standards, built ad hoc around specific needs, and therefore difficult to extrapolate from their original context. The initial draft regulation on the establishment of the European Public Prosecutor’s Office seemed to want to carry out such an operation: it proposed to set aside the internal rules and to submit the evidence gathered by the delegated prosecutors to the employment limits emerging from the conventional jurisprudence.

At this point, however, the error of perspective should seem rather obvious: a discipline so meager and essential cannot claim to replace the far more complex regulations to which the national courts are subject. Just to give an example, it is true that hearsay and bad character tests often end up being used by the English judge; however, they must first filter through an analytical framework of rules and exceptions.

If, when such a project is re-proposed, the regulatory platform on which the free circulation of evidence will be attempted will have to be more extensive

the possibility to challenge the use of such evidence and that national courts could have excluded it if they were of the opinion that it would give rise to substantive unfairness (...) is whether or not there was a possibility to challenge the admission of evidence obtained contrary to Article 8 (...).”

and structured in order to obtain the approval of Member States. The rules of Strasbourg are indeed a common patrimony, from which to draw and take the embrace; however, they do not seem sufficient either quantitatively or qualitatively to support, by themselves, the weight of representing the national usability regime of “European” tests.

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