While the conviction in this case was arguably justifiable given the quantity of other evidence available, the Strasbourg court's judgment has the potential to further water down the protections afforded to defendants by Article 6(3)(d).

The regional court received evidence of RK’s statement to the examining judge, which included “definite and detailed accounts” of the abuse the applicant inflicted upon her over the period 31 July to 2 August 2009 (at [19]). On 2nd August 2009, RK escaped and fled to a neighbour’s address, where she told two police officers that “her husband had beaten her” (at [27]). This initial account to the police was also admitted in evidence under the exception for “spontaneous utterances” provided by Federal Court of Justice case law.

The applicant appealed on the grounds, firstly, that the evidence of RK’s statement to the investigating judge breached the right to examine witnesses enshrined in Art. 6(3)(d). Secondly, he argued that her statement to the police officers was not a “spontaneous utterance”.

*Article 6(3)(d)*

The Law Commission, in its 1997 review of the hearsay regime (*Legislating the Criminal Code: Evidence in Criminal Proceedings: Hearsay Report,* LC 245), identified that a key justification for excluding hearsay evidence is that it has not been tested by cross examination. While acknowledging that this rather assumes the effectiveness of cross-examination as a forensic technique, the Commission concluded that the inability to question the maker of a hearsay statement “can be a serious objection to the admissibility of such evidence” (Report at 3.17).

The effect of the Grand Chamber’s decision in *Al-Khawaja and Tahery v UK* (2012) 54 E.H.R.R. 23 is that, where hearsay is the sole or decisive evidence against an accused, there must be “sufficient counterbalancing factors … including measures that permit a fair and proper assessment of the reliability of that evidence to take place” (at [147]). Although RK’s statement to the examining judge was not the sole evidence against the applicant, the Court considered that it carried “at least significant weight for the applicant’s conviction” (at [59]). Under German law, the investigating judge had been entitled to exclude the applicant and his counsel from the pre-trial examination of RK, but he ought to have appointed an advocate to question RK on the applicant’s behalf. This would have been an appropriate counterbalancing measure. The Court was nevertheless satisfied that the applicant had had a fair trial because the regional court had “thoroughly and cautiously assessed the credibility of RK and the reliability of her statements … and … there was ample and strong corroborating evidence” (at [61]). In addition, the applicant had been given an opportunity cross-examine the investigating judge and to testify in his own defence if he so wished (at [61]).

The investigating judge’s statement, as received by the regional court, included the observation that “[RK’s] account had been consistent and she had not been evasive, maintaining eye contact throughout” (at [19]). It would have been troubling if the regional court had based its assessment of RK’s credibility and reliability on the judge’s observations of her demeanour; an ability to maintain eye contact is not generally accepted as a reliable indicator of truthfulness. However, the regional court appears to have focussed on the wealth of available corroborating evidence as an indicator of reliability. In England and Wales, the Supreme Court confirmed in *Riat* [2012] EWCA Crim 1509 that *Al-Khawaja* has not reintroduced a corroboration requirement. There is, however, a need to ensure that where a hearsay statement is the “sole or decisive” evidence in the case, it is “potentially safely reliable” before it can be left to a jury (at [33]).

*Spontaneous utterances*

RK’s initial, brief statement to the police officers was admitted as a spontaneous utterance, echoing a *res gestae* exception in England and Wales. Preserved by s.118 CJA 2003, *res gestae* permits the admission of hearsay statements by those who were so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded. This exception is frequently relied on in cases involving domestic abuse when the alleged victim does not testify. The application of the *res gestae* exception is relatively straightforward where the injured party declines to make a formal statement at the outset and refuses to co-operate with the police investigation. In *Wills v DPP*, where the injured party simply failed to attend court, the Divisional Court suggested that a “good reason” would be required for her non-attendance before justices should accede to an application to admit her earlier statement under the *res gestae* gateway.

*“Good reason” for absence*

In respect of both statements under discussion, the Strasbourg court prefaced their discussion by emphasising that there had been a “good reason” for RK's absence at trial. In *Schatschaschwili v Germany*, the Grand Chamber summarised the decision in *Al-Khawaja* as requiring the court to examine:

“(i) whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness’s untested statements as evidence;

(ii) whether the evidence of the absent witness was the sole or decisive basis for the defendant’s conviction; and

(iii) whether there were sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.”

The first requirement appeared then to be a prerequisite for the admissibility of a hearsay statement. The German Code of Criminal Procedure gives a spouse the right not to give evidence against her husband and the Court confirmed that this was a “good reason” for her non-appearance at the applicant’s trial. However, in *Schatschaschwili* itself, the Court held that “the absence of good reason for the non-attendance of a witness cannot of itself be conclusive of the unfairness of a trial” (at [113]). In *Seton v UK,* the Fourth Chamber applied this principle to a key prosecution witness who was absent without good reason where the other evidence in the case was “overwhelming”. The present case extends the principles enunciated to cases in which a complainant is available, but refuses to give evidence. Once again, the court has focussed on the fairness of the trial overall and expanded the situations in which hearsay is admissible. This focus on whether a defendant received a fair trial overall, rather than the breach of a rule in the abstract, is similar to that adopted in England and Wales when considering whether a conviction is safe. As the Supreme Court observed in Horncastle [2009] EWCA Crim 964, “[t]here is, of course, an overlap between considering whether procedure has been fair and whether a verdict is safe, and it is sometimes difficult to distinguish between the two questions” (at [69]).