Hearsay and Human Rights.

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Hearsay evidence is a statement made out-of-court, used in a criminal trial, to establish or prove what it states. The common law has always been suspicious of hearsay because it is difficult to distinguish between hearsay that is reliable and persuasive proof of a fact in issue and hearsay that has very little probative value. Hearsay evidence weakens the common law tradition of orality and the importance of cross-examination. Therefore the common law took an exclusionary approach to hearsay in that it would not be admissible unless an exception applied e.g. the doctrine of *res gestae.*

The Criminal Justice Act 2003 (CJA) changes the exclusionary approach to one of inclusionary as section 114 (1) provides that "In criminal proceedings a statement not made in oral evidence is admissible as evidence of any matter stated if, but only if ". Section 114(1) then sets out four principal grounds for admitting hearsay including the introduction in section 114 (1) (d) of a "safety value" which allows a judge to admit hearsay that would otherwise be inadmissible under any other hearsay provision if it is in the "interests of justice" to do so. Section 114 (2) does contain factors which the court has to take into account when applying the safety-value, for example, how much probative value the statement has. However, in *Taylor* [2006] EWCA Crim 206 the Court of Appeal held that there is no need for the court to hear evidence on or to reach a specific conclusion on each of the factors.

It was thought that the introduction of the inclusionary definition of hearsay and of the safety value would mean that there would be a liberalisation of the admittance hearsay evidence in that more would be allowed in criminal trials and this would be a move towards the best evidence rule- original source if available, if not, hearsay. The domestic decisions certainly support this view. For example, there has been a significant decision on the safety-value in *Y* [2008] EWCA Crim 10, where the Court of Appeal reversed the established common law rule that a confession is only admissible against the person who made it and cannot be used against another defendant. Y was on trial for murder as an accomplice and the principal X admitted to his girlfriend that he had killed the victim and that Y had been present. Y denied being present. The trial judge concluded that s 114 (1) (d) had no application in admitting the girlfriend's statement as it contained X's confession. The prosecution made an interlocutory appeal against this ruling. The Court of Appeal allowed the appeal holding that the safety value was available for all types of hearsay including a confession and that it would be in the interests of justice to admit the girlfriend's statement even though she was unavailable for cross-examination. The hearsay (the confession) was the decisive evidence against Y. This decision is a significant step towards that liberalisation of hearsay evidence as it breaks free from the historic inflexibility of the hearsay rules. The Court of Appeal may have stated that admitting such a statement under section 114(1) (d) would only be possible where the statement was sufficiently reliable for it to be in the interests of justice to admit it without the test of cross-examination, but, the door is now open for trial judges to admit such hearsay evidence.

The other liberalising hearsay provisions of the CJA to mention are the witness unavailability provisions in section 116. Hearsay evidence will be admitted under these provisions if, first, the maker of the statement could have given admissible oral evidence on the matter. Second,

the court is satisfied as to the maker's identity and, third, the court is also satisfied that the witness is absent for one of the reasons set out in section 116(2) e.g. the witness is dead or is too frightened to give evidence. These provisions have enabled untested hearsay to be the sole or decisive evidence against defendants and two convicted defendants, convicted on that basis, applied to the European Court of Human Rights (Fourth Section). In *Al-Khawaja and Tahery v UK* (2009) 49 E.H.R.R. 1. AK was convicted of indecent assault the decisive evidence against him being the statement to the police of a complainant who had committed suicide. The statement was admitted through section 116(2) (a). The Court of Appeal upheld his conviction. T was convicted of wounding with intent and attempting to pervert the course of justice. One witness made a statement identifying T, but refused to give evidence because of fear of reprisals. The statement was admitted through section 116 (2) (e) (there being a requirement that it be in the interests of justice to admit the statement) and was the decisive evidence against T. The Court of Appeal upheld his conviction. Both applicants claimed that their rights under article 6(1) (the right to a fair trial) and article 6(3) (d) (the right to confront witnesses) had been violated by the admission of the hearsay evidence without a right of confrontation, the evidence in both cases being the decisive evidence upon which the convictions were based. The Strasbourg Court unanimously held there had been a violation of both articles as normally there could never be a fair trial where the sole or decisive evidence is untested. However, this prohibition was not absolute as it would not apply where the witness was unwilling to give evidence because of fear caused *by* the defendant. In that situation the defendant surrenders his right to cross-examination.

The judgment created great difficulties for English courts as it represented a significant rebuff to the liberalisation of hearsay evidence contained section 114 (1) (d) and in section 116 because trials would not be able to continue where the only or principal evidence is that of a witness who is unavailable. The Strasbourg Court emphasised that the rights contained in article 6 are not merely examples of the aspects of a fair trial but rather express guarantees. Where the hearsay evidence was decisive then no countermeasures (such as a direction by the judge) would be enough to cure the disadvantage to the defendant. It also meant that the "interests of justice" tests in sections 114 (1) (d) and 116 (2) (e) would have to be interpreted in light of the Strasbourg judgment-if the untested evidence is sole or decisive it should never (except where the defendant has frightened the witness into being absent) be admitted in the interests of justice.

A collision between Strasbourg and the English Courts over the "sole or decisive test' was widely anticipated and that collision has now occurred in the conjoined appeal of *Horncastle* [2009] UKSC 14. In the first of two appeals, H and B had been convicted of causing grievous bodily harm with intent to R. R had made a witness statement to the police about what had happened to him. He died before the trial. His statement was read at the trial. It had been admitted pursuant to section 116(2) (a). H and B appealed against their convictions, on the ground that they had not had a fair trial, contrary to article 6. The Court of Appeal dismissed their appeals. The Court of Appeal concluded that R's statement was "to a decisive degree" the basis upon which the appellants had been convicted. In the second appeal, M and G had been convicted of kidnapping a young woman, HM. She had made a witness statement to the police describing what happened to her. The day before M and G's trial she ran away because she was too frightened to give evidence. Her statement was read to the jury. It had been admitted pursuant to section 116 (2) (e) of the 2003 Act. M and G appealed against their convictions, also on the ground that they had not had a fair trial, contrary to article 6. The Court of Appeal dismissed their appeals. The appellants appealed to the Supreme Court.

The Supreme Court dismissed the appeals holding that there could be a fair trial for the purposes of article 6 (1) and article 6 (3) (d) even though a conviction was based solely or decisively on hearsay evidence. The real issue was whether the hearsay was reliable evidence and it was in the interests of justice to admit it (generally and for the purposes of section 114 (1) (d) and section 116 (2) (e)) even though the hearsay is the sole or decisive evidence against the defendant. The judgment of the Supreme Court does support the argument that the rights contained in the above articles are incidents of a fair trial but not necessarily express guarantees.

Thus the Supreme Court did not follow *Al-Khawaja* because the "sole or decisive rule" had been introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle that was applicable equally to the continental and common law jurisdictions. The Supreme Court refused to accept that it was "bound" by the decisions of the Strasbourg Court as the requirement of section 2 (1) of the Human Rights Act 1998 is to "take into account" the Strasbourg jurisprudence which means, in exceptional cases, the Supreme Court will not follow the Strasbourg Court where its principles are not clearly set out as had occurred in *Al-Khawaja.* Lord Brown stresses in his speech that ‘‘this case seems to me a very far cry from *Secretary of State for the Home Department v AF (No 3)* [2009] 3 WLR 74 where the House of Lords was faced with a definitive judgment of the Grand Chamber in *A v United Kingdom* (2009) 49 EHRR 625 on the very point at issue and where each member of the Committee felt no alternative but to apply it" (at [118]).

All this means that trial judges can now feel confident when applying the hearsay provisions of the CJA as the position in domestic law is now clear. This is a victory for the liberalisation of the admittance of hearsay evidence and there will be more convictions where the hearsay is the sole or, at least, the decisive basis for conviction. The common law tradition of orality and the importance of cross-examination have been further eroded by the decision in *Horncastle*. The Government may refer *Al-Khawaja* to the Grand Chamber of the Strasbourg Court and if it does it will be interesting to see if the Grand Chamber continues to support the sole or decisive rule in view of the Supreme Court's decision in *Horncastle*.