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## **Criminal Hearsay in England and Wales: Pragmatism, Comparativism, and Human Rights**

*Andrew L.-T. Choo\**

*The law of criminal hearsay in England and Wales has undergone substantial evolution in recent times. This article offers an analysis of these developments, undertaken against the background of a consideration of the reforms of hearsay doctrine that had taken place some years earlier in Canada. The relevant law in England and Wales appears highly regulated, being governed by detailed statutory provisions and subject further to an express “confrontation” guarantee contained in the European Convention on Human Rights. The Canadian law, by contrast, developed in a more piecemeal fashion and is not subject to any express “confrontation” guarantee. Comparisons of the law of criminal hearsay in England and Wales with that in Canada having largely been ignored in the academic literature, this article fills the gap and asks whether scholars and practitioners in each jurisdiction may gain valuable insights from the experiences of their counterparts across the Atlantic.*

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*Les règles en droit criminel portant sur le oui-dire en Angleterre et au pays de Galles ont beaucoup évolué ces derniers temps. Dans cet article, l’auteur présente une analyse de ces développements, à la lumière des réformes de la doctrine sur le oui-dire qui ont eu lieu quelques années auparavant au Canada. Le droit pertinent en Angleterre et au pays de Galles semble très réglementé, car il est gouverné par des dispositions statutaires détaillées ainsi que par une garantie expresse de « confrontation » contenue dans la Convention européenne des droits de l’homme. Le droit canadien, lui, a évolué d’une façon plus fragmentée et ne contient aucune garantie de « confrontation ». En comparant le droit criminel entourant le oui-dire en Angleterre et au pays de Galles avec celui du Canada, ce qui a rarement été fait dans la documentation scientifique, cet article comble un vide et pose la question de savoir si les professeurs et les praticiens dans chacun de ces pays pourraient*

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*tirer profit d'une analyse de l'expérience de leurs homologues de l'autre côté de l'Atlantique.*

Concern about hearsay evidence, especially where such evidence is introduced against a defendant in a criminal trial, is understandable. While any statement may be unreliable because of defects in its maker's perception, memory, sincerity, or ability to communicate clearly, it has traditionally been assumed that a statement made in court about some event claimed to have been witnessed will be able to be "tested" through observation of its maker's demeanour and through contemporaneous cross-examination.<sup>1</sup> When these "tests" are unavailable, where a statement made out of court about an allegedly witnessed event is later introduced in court as evidence of the truth of its contents, there is good reason to be cautious about the reliability of such evidence.<sup>2</sup> In more contemporary times, however, scepticism about the effectiveness of the "tests" of observation of demeanour and contemporaneous cross-examination,<sup>3</sup> and empirical evidence questioning the assumption that juries are incapable of assessing the reliability of hearsay evidence competently,<sup>4</sup> have raised the possibility that, as a class, first-hand evidence may not be far superior to hearsay evidence. As a corollary of this, the question is raised whether a more contextual approach to the admissibility of hearsay evidence, one that distances itself somewhat from the traditional suspicion with which such evidence was approached, might be appropriate.

In England and Wales, as in Canada, the operation of the hearsay rule in criminal proceedings<sup>5</sup> has undergone substantial development and generated a considerable amount of academic discussion over the past few decades. It is unfortunate, however, that scholars of criminal evidence in each jurisdiction have, in their writings on hearsay, generally shied away from attempts to gain insights from the experiences of the other. I seek here to redress this. As will be seen, reform of the rule

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<sup>1</sup> "To say that a statement is sufficiently reliable because it is made under oath, in person, and the maker is cross-examined is somewhat of a misnomer. A lot of courtroom testimony proves to be totally unreliable. However, therein lies the safeguard — in the *process* that has uncovered its untrustworthiness": *R. v. Khelawon*, 2006 SCC 57, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1, at para. 80 (italics in original).

<sup>2</sup> "The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost": *Teper v. R.*, [1952] A.C. 480 (British Guyana P.C.) at p. 486 per Lord Normand.

<sup>3</sup> For a fuller discussion see Andrew L.-T. Choo, *Evidence*, 3rd ed. (Oxford: Oxford University Press, 2012) at p. 278.

<sup>4</sup> See generally, for discussions of empirical evidence concerning the hearsay rule, Roger C. Park, "Empirical Evaluation of the Hearsay Rule," in Peter Mirfield and Roger Smith (editors), *Essays for Colin Tapper* (Oxford: Oxford University Press, 2003); Roger C. Park, "Visions of Applying the Scientific Method to the Hearsay Rule" [2003] *Michigan State Law Review* 1149.

<sup>5</sup> Among the voluminous literature on the topic in England and Wales is the useful, although now somewhat dated, J. R. Spencer, *Hearsay Evidence in Criminal Proceedings* (Oxford: Hart, 2008).

was slower to arrive in England and Wales than it was in Canada, and had different origins. Furthermore, unlike in Canada, the development of the rule in England and Wales has had to take account of the express right afforded to defendants to examine or have examined witnesses against them. This article considers, from the perspective of an academic lawyer in England and Wales, particular aspects of criminal hearsay doctrine in that jurisdiction. My primary aim is to determine whether, despite such differences, the actual content of the relevant law in England and Wales and in Canada may in fact have converged to a large degree, so that lawyers in each jurisdiction may now benefit considerably from examining the law in the other.

## 1. BACKGROUND AND CONTEXT

Canadian readers will be familiar with the jurisprudence of the Supreme Court of Canada which led to the adoption of an approach whereby hearsay evidence can be admitted if the trial judge considers that (1) it is necessary to do so (the “necessity” criterion) and that (2) the evidence is sufficiently reliable to be admitted (the “threshold reliability” criterion).<sup>6</sup> The first criterion “is intended to ensure that the evidence presented to the court be in the best available form, usually by calling the maker of the statement as a witness,”<sup>7</sup> while the second “is usually met by showing that sufficient trust can be put in the truth and accuracy of the statements because of the way in which they came about, or by showing that in the circumstances the ultimate trier of fact will be in a position to sufficiently assess their worth.”<sup>8</sup> By

<sup>6</sup> *R. v. Khan*, 1990 CarswellOnt 108, 1990 CarswellOnt 1001, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1; *R. v. F. (W.J.)*, 1999 CarswellSask 625, 1999 CarswellSask 626, [1999] 3 S.C.R. 569, 138 C.C.C. (3d) 1, 27 C.R. (5th) 169; *R. v. Starr*, 2000 SCC 40, 2000 CarswellMan 449, 2000 CarswellMan 450, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 36 C.R. (5th) 1; *R. v. Parrott*, 2001 SCC 3, 2001 CarswellNfld 13, 2001 CarswellNfld 14, [2001] 1 S.C.R. 178, 150 C.C.C. (3d) 449, 39 C.R. (5th) 255; *R. v. Mapara*, 2005 SCC 23, 2005 CarswellBC 963, 2005 CarswellBC 964, [2005] 1 S.C.R. 358, 195 C.C.C. (3d) 225, 28 C.R. (6th) 1; *R. v. Khelawon*, 2006 SCC 57, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1; *R. v. Couture*, 2007 SCC 28, 2007 CarswellBC 1365, 2007 CarswellBC 1366, [2007] 2 S.C.R. 517, (sub nom. *R. c. C. (D.R.)*) 220 C.C.C. (3d) 289, 47 C.R. (6th) 1; *R. v. Devine*, 2008 SCC 36, 2008 CarswellAlta 784, 2008 CarswellAlta 785, [2008] 2 S.C.R. 283, 232 C.C.C. (3d) 1, 57 C.R. (6th) 1; *R. v. Blackman*, 2008 SCC 37, 2008 CarswellOnt 3722, 2008 CarswellOnt 3723, [2008] 2 S.C.R. 298, 232 C.C.C. (3d) 233, 57 C.R. (6th) 12. See generally Shawn Moen, “Seeking More Than Truth: A Rationalization of the Principled Exception to the Hearsay Rule” (2011) 48 *Alberta Law Review* 753; Hamish Stewart, “*Khelawon*: The Principled Approach to Hearsay Revisited” (2007) 12 *Canadian Criminal Law Review* 95; Alan W. Bryant, Sidney N. Lederman, and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis Canada, 2009) at pp. 245–273; David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011) at Ch. 5.

<sup>7</sup> *R. v. Couture*, 2007 SCC 28, 2007 CarswellBC 1365, 2007 CarswellBC 1366, [2007] 2 S.C.R. 517, (sub nom. *R. c. C. (D.R.)*) 220 C.C.C. (3d) 289, 47 C.R. (6th) 1, at para. 79.

<sup>8</sup> *R. v. Blackman*, 2008 SCC 37, 2008 CarswellOnt 3722, 2008 CarswellOnt 3723, [2008] 2 S.C.R. 298, 232 C.C.C. (3d) 233, 57 C.R. (6th) 12, at para. 35.

sharp contrast, the House of Lords held in 1991 in *R. v. Kearley (No. 1)*<sup>9</sup> that reform of the hearsay rule could not be undertaken judicially, but was the responsibility of the legislature. This meant that any further exceptions to the hearsay rule, such as a flexible exception that permitted hearsay evidence to be admitted if it was sufficiently reliable, could only be created by Parliament. Although the *Civil Evidence Act 1995* effectively abolished the hearsay rule in civil proceedings,<sup>10</sup> reform of the rule in criminal proceedings took a considerably slower course. The work of the Law Commission<sup>11</sup> on the topic eventually culminated in the hearsay provisions of the *Criminal Justice Act 2003*. These provisions, which came into force in 2005, have as their starting point the general rule that “a statement not made in oral evidence in the proceedings” is inadmissible “as evidence of any matter stated”<sup>12</sup> if a purpose of the maker of the statement “appears . . . to have been . . . to cause another person to believe the matter, or . . . to cause another person to act or a machine to operate on the basis that the matter is as stated.”<sup>13</sup> There are four categories of exception to this general rule. Subject to certain other safeguards to be examined below being satisfied, these four gateways allow hearsay evidence to be admitted if:

- (1) any statutory exception, whether contained in the 2003 Act itself or elsewhere, makes the evidence admissible (section 114(1)(a)); or
- (2) any common law exception expressly preserved by section 118 of the 2003 Act makes the evidence admissible (section 114(1)(b)); or
- (3) all parties agree to the evidence being admissible (section 114(1)(c)); or
- (4) “the court is satisfied that it is in the interests of justice for [the evidence] to be admissible” (section 114(1)(d)).

In the case of multiple hearsay, section 121(1) must also be satisfied.<sup>14</sup> This article does not consider multiple hearsay, focusing on situations involving an out-of-court statement that does not itself report an earlier statement. It will further be assumed that the identity of the maker of the out-of-court statement is known.<sup>15</sup>

<sup>9</sup> [1992] 2 A.C. 228 (U.K. H.L.).

<sup>10</sup> See, e.g., Choo, *Evidence*, at pp. 279–282.

<sup>11</sup> Law Commission, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), available online: <[http://lawcommission.justice.gov.uk/docs/lc245\\_Legislating\\_the\\_Criminal\\_Code\\_Evidence\\_in\\_Criminal\\_Proceedings.pdf](http://lawcommission.justice.gov.uk/docs/lc245_Legislating_the_Criminal_Code_Evidence_in_Criminal_Proceedings.pdf)>

<sup>12</sup> Section 114(1).

<sup>13</sup> Section 115(3).

<sup>14</sup> *Maher v. DPP*, [2006] EWHC 1271 (Admin) (Div. Ct.) provides a good illustration of the operation of s. 121(1). See also *R. v. Thakrar (Miran)*, [2010] EWCA Crim 1505; *R. v. Friel (Christopher)*, [2012] EWCA Crim 2871.

<sup>15</sup> In *Al-Khawaja and Tahery v. UK*, [2011] ECHR 26766/05 and 22228/06, at para. 148, the Grand Chamber of the European Court of Human Rights took the view that “anonymous” hearsay evidence can never be admitted: “Whatever the reasons for the absence of a witness, the admission of statements of a witness who is not only absent but anonymous is not admissible.” The general issue of anonymous witnesses has been extensively discussed in England and Wales in recent times: see, e.g., David Ormerod, An-

The two main statutory exceptions contained in the 2003 *Act* itself deal with statements by persons who can be considered to have become unavailable to give oral evidence (section 116) and with “business” documents (section 117). The common law exceptions preserved by section 118 include the *res gestae* exception. It is, however, the gateway allowing hearsay evidence to be admitted in the interests of justice (section 114(1)(d))<sup>16</sup> that is, by the standards of previous hearsay doctrine in England and Wales, the most novel and radical. This “new” gateway for the admissibility of hearsay evidence suggests parallels with the Canadian “necessity and reliability” test for the admissibility of such evidence. With this in mind, I turn now to an examination of the operation of the “interests of justice” gateway in England and Wales.

## 2. THE “INTERESTS OF JUSTICE” GATEWAY

Section 114(2) of the 2003 *Act* provides that, in deciding whether a hearsay statement should be admitted under the “interests of justice” test in section 114(1)(d):

the court must have regard to the following factors (and to any others it considers relevant) —

- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
- (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
- (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
- (d) the circumstances in which the statement was made;
- (e) how reliable the maker of the statement appears to be;
- (f) how reliable the evidence of the making of the statement appears to be;
- (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
- (h) the amount of difficulty involved in challenging the statement;
- (i) the extent to which that difficulty would be likely to prejudice the party facing it.

In their general remarks on section 114(1)(d), the appellate courts of England and Wales have appeared keen to strike a balance between, on the one hand, emphasizing that evidence is not “routinely to be admitted”<sup>17</sup> under the provision, but,

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drew L.-T. Choo, and Rachel L. Easter, “*Coroners and Justice Act 2009: The ‘Witness Anonymity’ and ‘Investigation Anonymity’ Provisions*” [2010] *Criminal Law Review* 368.

<sup>16</sup> See, generally, Michael Stockdale, “The Safety-Valve: Discretion to Admit Hearsay Evidence in Criminal Proceedings” (2012) 76 *Journal of Criminal Law* 314.

<sup>17</sup> *R. v. Y*, [2008] EWCA Crim 10, at para. 62. See also *R. v. E.D.*, [2010] EWCA Crim 1213, at para. 17: “It is not permissible to nod through hearsay evidence merely be-

on the other hand, noting that the provision is not necessarily to be applied in exceptional circumstances only. Thus it has been stated that, despite a body of opinion that “the interests of justice provision . . . is a limited inclusionary discretion to be used only exceptionally, . . . there is nothing in the section which suggests such a narrow approach. . . . Nevertheless, the [provision] must not be lightly applied.”<sup>18</sup> In another case it was observed, to like effect, that “section 114(1)(d) . . . is to be cautiously applied, since otherwise the conditions laid down by Parliament in section 116 would be circumvented. . . . But section 114(1)(d) should not be so narrowly applied that it has no effect.”<sup>19</sup>

Such comments are not perhaps greatly helpful to trial judges in indicating the precise balance that ought to be struck between the need for caution and the need to ensure that the gateway is not rendered ineffective. One theme that does emerge clearly from the jurisprudence of the Court of Appeal is that caution is necessary at least to the extent of ensuring that the principle that first-hand evidence is to be preferred is not sidelined:

Both the interests of justice test and section 114(2)(g) command attention to the question whether oral evidence can be given, rather than reliance be placed on the hearsay statement. We would expect that before reaching the conclusion that it is in the interests of justice to admit a hearsay statement, the Judge must very carefully consider the alternatives. The alternatives may well include the bringing of an available, but reluctant, witness to court. It by no means follows in practice that [such] a witness . . . will in fact refuse to give evidence if brought to court. If he may do so, then consideration will also need to be given to whether justice would better be served by putting him before the jury so that they can see him, with the possibility of applying to cross-examine him upon the previous statement, rather than simply putting in that statement for evaluation in the abstract by the jury. . . . Such a course would not necessarily prevent a subsequent application under section 114(1)(d) if it became apparent that there was sufficient reliability in the statement to justify it.<sup>20</sup>

There may well be a strong hint here that, as in Canada, the necessity for the admissibility of hearsay evidence is an important underlying principle to be kept in mind.

From a Canadian perspective it might appear that the enumeration by statute of a list of mandatory factors for consideration would enhance certainty and predictability. Whether it does so in reality is, however, debatable. The Court of Appeal of England and Wales appears willing to give trial judges a relatively “free hand” in working with the relevant factors, imposing no requirement that a concluded view be reached on each of them:

What is required of [the trial judge] is to give consideration to those factors. There is nothing in the wording of the statute to require him to reach a spe-

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cause it is convenient to the party seeking its admission and the evidence is of value upon an important issue in the trial.”

<sup>18</sup> *Sak v. Crown Prosecution Service*, [2007] EWHC 2886 (Admin), at para. 20 (Div. Ct.).

<sup>19</sup> *R. v. Z*, [2009] EWCA Crim 20, at para. 20. See also *R. v. E.D.*, [2010] EWCA Crim 1213, at para. 17.

<sup>20</sup> *R. v. Y*, [2008] EWCA Crim 10, at para. 60.

cific conclusion in relation to each or any of them. He must give consideration to those identified factors and any others which he considers relevant (as expressed in section 114(2) before the nine factors are listed). It is then his task to assess the significance of those factors, both in relation to each other and having regard to such weight as, in his judgment, they bear individually and in relation to each other. Having approached the matter in that way, he will be able, as it seems to us, in accordance with the words of the statute, to reach a proper conclusion as to whether or not the . . . evidence should be admitted.<sup>21</sup>

In a similar vein, the Court of Appeal is unwilling to interfere with decisions reached by trial judges on section 114(1)(d)/section 114(2), as exemplified by remarks such as the following:

This was a situation calling for the exercise of the judgment of the trial judge. This court will interfere if, but only if, he has exercised it on wrong principles or reached a conclusion which was outside the band of legitimate decision available to him. We are unable to see that his decision can be criticised on either ground.<sup>22</sup>

This may sound familiar to readers in Canada, where the Supreme Court has likewise noted that appellate courts should not readily interfere with trial judges' application of the "necessity and reliability" test.<sup>23</sup>

Notwithstanding this, a relatively recent example of the robust rejection of the use of section 114(1)(d) may be found in the decision of the Court of Appeal of England and Wales in *R. v. CT*.<sup>24</sup> At issue was the admissibility, in a trial for assault occasioning actual bodily harm, of evidence of the complainant's witness statements and of a recording of her emergency telephone call to the police. The Court of Appeal held that the evidence had been incorrectly admitted, criticizing in particular the trial judge's handling of sections 114(2)(c) and 114(2)(g):

In our judgment, this is a case in which the conditions laid down by Parliament in section 116 . . . were circumvented. It was a case in which the live evidence of the complainant could have been available at the trial. . . . [I]f reasonable steps had been taken, she could in all probability have been located and a witness summons issued and served. There was no reason to

<sup>21</sup> *R. v. Taylor (Stuart)*, [2006] EWCA Crim 260, at para. 39.

<sup>22</sup> *R. v. Finch (David Barry)*, [2007] EWCA Crim 36, at para. 23. Note, however, *R. v. Z*, [2009] EWCA Crim 20, at para. 25: "The Court will be more willing to interfere with [a trial judge's] decision if he has not taken into account, or has not shown that he took into account, relevant matters listed in subsection (2). This is such a case."

<sup>23</sup> *R. v. Blackman*, 2008 SCC 37, 2008 CarswellOnt 3722, 2008 CarswellOnt 3723, [2008] 2 S.C.R. 298, 232 C.C.C. (3d) 233, 57 C.R. (6th) 12: "The trial judge is well placed to determine the extent to which the hearsay dangers of a particular case are of concern and whether they can be sufficiently alleviated. Accordingly, the trial judge's ruling on admissibility, if informed by correct principles of law, is entitled to deference" (at para. 36). "In the absence of any error in principle, or a finding that the trial judge's decision is unreasonable or unsupported by the evidence, there is no basis to interfere with the trial judge's weighing of the various factors" (at para. 46).

<sup>24</sup> [2011] EWCA Crim 2341.



believe that the complainant would not have complied with a witness summons.<sup>25</sup>

Thus the important factor set out in section 114(2)(g) should have led to the response that the oral evidence of the complainant could have been given, and if it was unavailable that was through the failure of the prosecution to take reasonable steps to secure the attendance of the complainant.<sup>26</sup>

...

... There was no evidence that the complainant could not be traced: the implication of the finding that no reasonable steps had been taken to trace her was that she could have been traced. In stating that she would in any event have refused to give evidence through fear of the appellant the judge was speculating. . . .<sup>27</sup>

It was also necessary for the judge to consider paragraph (c) of section 114(2). The evidence in question could not have been more important in the context of the case as a whole. Without it the prosecution could not continue. It was virtually the entirety of the prosecution case. Only in rare circumstances, if any, can it be right to allow evidence of this importance to be adduced when there has been a failure to take reasonable steps to secure the attendance of the witness. There was no justification for it to be admitted in the present case.<sup>28</sup>

...

In our judgment, the judge failed to place proper weight on the matter listed in section 114(2)(c) and his consideration of the factor in paragraph (g) was flawed.<sup>29</sup>

### 3. SPECIFIC SAFEGUARDS

An item of hearsay evidence that is *prima facie* admissible under one of the four gateways to admissibility contained in the 2003 *Act* may nevertheless be excluded. Such exclusion may be achieved pursuant to the common law discretion to exclude prosecution evidence the probative value of which is outweighed by its prejudicial effect,<sup>30</sup> or pursuant to the statutory discretion to exclude prosecution evidence that is encapsulated in section 78(1) of the *Police and Criminal Evidence Act 1984* (“PACE”), which provides: “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.” Furthermore, there are specific safeguards contained in the 2003 *Act* itself. Under section 126(1)(b), a court “may refuse to admit” a hearsay statement if “the court is satisfied that the case for excluding the statement, taking ac-

<sup>25</sup> *Ibid.*, at para. 12.

<sup>26</sup> *Ibid.*, at para. 13.

<sup>27</sup> *Ibid.*, at para. 15.

<sup>28</sup> *Ibid.*, at para. 16.

<sup>29</sup> *Ibid.*, at para. 18.

<sup>30</sup> See, e.g., *R. v. Randall* (Edward Peter), [2003] UKHL 69.

count of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.”

The Court of Appeal has articulated the view that, in considering these exclusionary tools, a trial judge may usefully have regard to the factors enumerated in section 114(2): “The non-exhaustive considerations listed in s. 114(2) as directly applicable to an application made under s. 114(1)(d) are useful *aides memoire* for any judge considering the admissibility of hearsay evidence, whether under that subsection or under s. 78 PACE, or otherwise.”<sup>31</sup> The implication of this appears to be that, even where a specific exception to the hearsay rule clearly applies to an item of evidence, it may nevertheless be excluded if, taking into account the section 114(2) factors, the interests of justice favour exclusion. An interesting parallel may be drawn here with the approach taken in Canada. The Supreme Court of Canada has clarified that the “necessity and reliability” test for the admissibility of hearsay evidence stands alongside and does not replace the specific exceptions to the hearsay rule.<sup>32</sup> While, however, it is primarily to be regarded as an inclusionary tool, the “necessity and reliability” test has potentially further-reaching effects. Thus, “[a] hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.” Indeed, in rare cases, “evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.”<sup>33</sup> In England and Wales it appears, likewise, that the specific exceptions to the hearsay rule are to be interpreted in a way that is consistent with the spirit of the “interests of justice” gateway. On this point the courts in England and Wales may therefore have much to learn from the relevant Canadian jurisprudence, which reflects more extensive experience with the concept.

Finally, of relevance to cases in which hearsay evidence has been admitted is section 125(1) of the 2003 *Act*, which provides:

- If on a defendant’s trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that —
- (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
  - (b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe,

<sup>31</sup> *R. v. Riat (Jaspal)*, [2012] EWCA Crim 1509, at para. 22. See also *R. v. Cole (Konrad)*, [2007] EWCA Crim 1924, at paras. 7, 21, 39, and 73; *R. v. Pulley (Ian Jon)*, [2008] EWCA Crim 260, at paras. 24, 53, and 56; *Gian v. Crown Prosecution Service*, [2009] EWCA Crim 2553, at para. 48; *R. v. Ibrahim (Dahir)*, [2012] EWCA Crim 837, at para. 106. See also *R. v. Zejmowicz (Krzysztof)*, [2011] EWCA Crim 1173, at para. 61.

<sup>32</sup> “[I]t is neither desirable nor necessary to abolish [the traditional hearsay] exceptions outright”: *R. v. Starr*, 2000 SCC 40, 2000 CarswellMan 449, 2000 CarswellMan 450, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 36 C.R. (5th) 1, at para. 207.

<sup>33</sup> *R. v. Mapara*, 2005 SCC 23, 2005 CarswellBC 963, 2005 CarswellBC 964, [2005] 1 S.C.R. 358, 195 C.C.C. (3d) 225, 28 C.R. (6th) 1, at para. 15.

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.

The Court of Appeal has expressed the view<sup>34</sup> that this power supplements, and does not merely replicate, the established common law power to stop a case, withdraw it from the jury, and direct an acquittal, where there is no case for the defendant to answer.<sup>35</sup>

#### 4. THE INFLUENCE OF EUROPEAN HUMAN RIGHTS LAW

The *Human Rights Act 1998*, which came fully into force in England and Wales in October 2000, has the effect of “incorporating” the European Convention on Human Rights into domestic law by making certain Convention rights directly enforceable in domestic courts.<sup>36</sup> Section 6 of the *Act* obliges public authorities, including courts,<sup>37</sup> to act in a way which is compatible with the Convention rights<sup>38</sup> unless provisions in primary legislation require them to act differently.<sup>39</sup> Of significance, too, is section 2(1): “A court . . . determining a question which has arisen in connection with a Convention right must take into account any . . . judgment . . . of the European Court of Human Rights . . . whenever made or given, so far as, in the opinion of the court . . ., it is relevant to the proceedings in which that question has arisen.”

One of the Convention rights that the 1998 *Act* makes directly enforceable in domestic law is article 6. Of fundamental importance to the law of evidence generally is article 6(1), which guarantees the right to a fair trial. In addition, article 6 guarantees a number of specific rights, all of which are closely allied to the right to a fair trial. The specific right that is of particular relevance in the context of hearsay is the right guaranteed by article 6(3)(d) to a person charged with a criminal offence “to examine or have examined witnesses against him.”<sup>40</sup> This may be compared with the guarantee expressed in the Sixth Amendment to the US Constitution that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be con-

<sup>34</sup> *R. v. Riat (Jaspal)*, [2012] EWCA Crim 1509, at para. 28.

<sup>35</sup> The source of this power is *R. v. Galbraith (George Charles)*, [1981] 1 W.L.R. 1039 (C.A. (Crim. Div.)); see generally Choo, *Evidence*, at pp. 68-69, and text accompanying footnote 62 below.

<sup>36</sup> See generally Ben Emmerson, Andrew Ashworth, and Alison Macdonald (editors), *Human Rights and Criminal Justice*, 3rd ed. (London: Sweet & Maxwell, 2012).

<sup>37</sup> Section 6(3)(a).

<sup>38</sup> Section 6(1).

<sup>39</sup> Section 6(2).

<sup>40</sup> See generally John Jackson and Sarah Summers, “Confrontation with Strasbourg: UK and Swiss Approaches to Criminal Evidence” [2013] *Criminal Law Review* 114; Mike Redmayne, “Confronting Confrontation”, in Paul Roberts and Jill Hunter (editors), *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart, 2012); John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) at Ch. 10; Stefano Maffei, *The Right to Confrontation in Europe: Absent, Anonymous and Vulnerable Witnesses*, 2nd ed. (Groningen: Europa Law, 2012).

fronted with the witnesses against him”<sup>41</sup> (the so-called “Confrontation Clause”). Notable from the perspective of an observer in England and Wales is that the *Canadian Charter of Rights and Freedoms* contains no express guarantee of the above kinds, even though the *Charter* may provide indirect protection inasmuch as “difficulties in testing . . . evidence . . . may impact on an accused’s ability to make full answer and defence, a right protected by s. 7 of the Canadian Charter of Rights and Freedoms . . . The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial . . .”<sup>42</sup>

Has the existence of an express guarantee in England and Wales, and the absence thereof in Canada, resulted in the law of criminal hearsay in England and Wales affording greater protection to defendants than its Canadian counterpart? To answer this question, a look will now be taken at the relevant article 6(3)(d) jurisprudence.

### (a) A Robust Rejection by the UK Supreme Court of European Court of Human Rights Jurisprudence

Following a stream of jurisprudence from the European Court of Human Rights in Strasbourg involving cases from other jurisdictions,<sup>43</sup> the judgment in *Al-Khawaja and Tahery v. UK*<sup>44</sup> was the first judgment of the Court to consider the hearsay provisions in operation in criminal proceedings in England and Wales. *Al-Khawaja*, a doctor, was charged on two counts of indecent assault, the complain-

<sup>41</sup> See generally James J. Tomkovicz, *Constitutional Exclusion: The Rules, Rights, and Remedies that Strike the Balance between Freedom and Order* (New York: Oxford University Press, 2011) at Ch. 7.

<sup>42</sup> *R. v. Khelawon*, 2006 SCC 57, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1, at para. 47. See also *R. v. Parrott*, 2001 SCC 3, 2001 CarswellNfld 13, 2001 CarswellNfld 14, [2001] 1 S.C.R. 178, 150 C.C.C. (3d) 449, 39 C.R. (5th) 255, at para. 51: “While in this country an accused does not have an [express] right to confront his or her accuser in the course of a criminal trial, the right to full answer and defence generally produces this result.”

<sup>43</sup> See, e.g., *Unterpertinger v. Austria*, [1986] ECHR 9120/80; *Kostovski v. Netherlands*, [1989] ECHR 11454/85; *Windisch v. Austria*, [1990] ECHR 12489/86; *Delta v. France*, [1990] ECHR 11444/85; *Isgrò v. Italy*, [1991] ECHR 11339/85; *Asch v. Austria*, [1991] ECHR 12398/86; *Lüdi v. Switzerland*, [1992] ECHR 12433/86; *Artner v. Austria*, [1992] ECHR 13161/87; *Saïdi v. France*, [1993] ECHR 14647/89; *Doorson v. Netherlands*, [1996] ECHR 20524/92; *Van Mechelen v. Netherlands*, [1997] ECHR 21363/93; *P.S. v. Germany*, [2001] ECHR 33900/96; *Lucà v. Italy*, [2001] ECHR 33354/96; *Visser v. Netherlands*, [2002] ECHR 26668/95; *S.N. v. Sweden*, [2002] ECHR 34209/96 (see, generally, Louise Ellison, “The Right of Challenge in Sexual Offence Cases: *S.N. v. Sweden*” (2003) 7 *International Journal of Evidence and Proof* 62); *Laukkanen v. Finland*, [2004] ECHR 50230/99; *Krasniki v. Czech Republic*, [2006] ECHR 51277/99; *Romanov v. Russia*, [2008] ECHR 41461/02; *Polufakin and Chernyshev v. Russia*, [2008] ECHR 30997/02; *Balsytė-Lideikienė v. Lithuania*, [2008] ECHR 72596/01; *Demski v. Poland*, [2008] ECHR 22695/03; *Trofimov v. Russia*, [2008] ECHR 1111/02; *Mirilashvili v. Russia*, [2008] ECHR 6293/04.

<sup>44</sup> [2009] ECHR 26766/05 and 22228/06. See, generally, J. R. Spencer, “Hearsay Reform: The Train Hits the Buffers at Strasbourg” [2009] *Cambridge Law Journal* 258.

ants being S.T. (count one) and V.U. (count two). S.T. made a witness statement but died before the trial. In respect of count one, S.T.'s written statement was admitted in evidence under the then applicable law in England and Wales, and, *inter alia*, two friends of S.T.'s whom S.T. had informed about the alleged assault testified. In respect of count two, testimony was heard, *inter alia*, from V.U. Tahery was charged with wounding S. with intent. S. testified but was unable to contribute much of value. A witness statement made by one T., who had been present at the time of the incident in question but refused to testify through fear, was admitted in evidence. The convictions of Al-Khawaja and Tahery arose for consideration in the European Court of Human Rights. The Court appeared to recognize the existence of a *rule* whereby the introduction in evidence of a hearsay statement which constituted the sole or decisive evidence against the defendant would breach article 6(3)(d), and the general right to a fair trial under article 6(1), unless the defendant had had an adequate opportunity at some stage to cross-examine the maker of the statement, or unless the maker of the statement was kept from giving evidence through fear induced by the defendant.<sup>45</sup> Applying this, the Court found a violation of article 6(1), read in conjunction with article 6(3)(d), in respect of both Al-Khawaja and Tahery.

The UK Supreme Court had the opportunity to consider this judgment a few months later in *R. v. Horncastle (Michael Christopher)*.<sup>46</sup> Delivering a judgment with which the other six members of the Court agreed, Lord Phillips declined to follow *Al-Khawaja and Tahery v. UK*, noting that, while "[t]he requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court," the present case represented one of the "rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course."<sup>47</sup>

<sup>45</sup> [2009] ECHR 26766/05 and 22228/06, at para. 37.

<sup>46</sup> (2009), [2009] UKSC 14, [2010] 2 A.C. 373. See generally Eirik Bjorge, "Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*" [2011] Public Law 475; Ian Dennis, "The Right to Confront Witnesses: Meanings, Myths and Human Rights" [2010] Criminal Law Review 255; Imogen Jones, "A Political Judgment? Reconciling Hearsay and the Right to Challenge" (2010) 14 International Journal of Evidence and Proof 232; William E. O'Brien Jr., "Confrontation: The Defiance of the English Courts" (2011) 15 International Journal of Evidence and Proof 93; Marny Requa, "Absent Witnesses and the UK Supreme Court: Judicial Deference as Judicial Dialogue?" (2010) 14 International Journal of Evidence and Proof 208; Stuart Wallace, "The Empire Strikes Back: Hearsay Rules in Common Law Legal Systems and the Jurisprudence of the European Court of Human Rights" [2010] European Human Rights Law Review 408. In the following discussion of *Horncastle*, I have drawn on my comment on the case available online: <<http://uksblog.com/case-comment-r-v-horncastle-2009-uksc-14>>, on my contribution to Emmerson, Ashworth, and Macdonald (editors), *Human Rights and Criminal Justice*, at Ch. 12, and on Choo, *Evidence*, at pp. 304-305.

<sup>47</sup> [2009] UKSC 14, at para. 11.

The reasons that Lord Phillips put forward for declining to follow *Al-Khawaja and Tahery v. UK* included the following. First, Lord Phillips was prepared to accept that the provisions of the 2003 *Act*, which “contain[ed] a crafted code intended to ensure that evidence is admitted only when it is fair that it should be,”<sup>48</sup> were being applied cautiously by the courts.<sup>49</sup> While “the justification for the sole or decisive test would appear to be that the risk of an unsafe conviction based solely or decisively on . . . hearsay evidence is so great that such a conviction can never be permitted,” the provisions of the 2003 *Act* represented a “less draconian” way of protecting against the risk of an unsafe conviction.<sup>50</sup> Secondly, a rule excluding hearsay evidence that constituted the sole or decisive evidence against the defendant did not exist in Canada, Australia, or New Zealand.<sup>51</sup> Thirdly, the criminal procedure of England and Wales differed from that traditionally to be found in civil law jurisdictions: “In this jurisdiction there is no judicial investigation, in the course of which a confrontation can take place between witnesses and the suspect. The investigation into a crime is carried out by the police, who do not act as judicial officers . . .”<sup>52</sup> Fourthly, it might be difficult to determine in a particular case whether hearsay evidence constitutes the “decisive” evidence against the defendant: “The judge will have to rule inadmissible any witness statement capable of proving ‘decisive.’ This will be no easy task . . . If ‘decisive’ means capable of making the difference between a finding of guilt and innocence, then all hearsay evidence will have to be excluded.”<sup>53</sup> Fifthly, an analysis of Strasbourg cases in which violations of article 6(3)(d) had been found<sup>54</sup> revealed that, if the law of England and Wales had been applied in these cases, the relevant evidence would have been declared inadmissible, and the defendant would not have been convicted, in almost all of them. This was taken to “suggest that in general our rules of admissibility provide the defendant with at least equal protection to that provided under the continental system.”<sup>55</sup> In conclusion, therefore, Lord Phillips, having “taken careful account of the Strasbourg jurisprudence,” expressed the “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.”<sup>56</sup>

The UK Supreme Court’s robust assertion that to “take into account” Strasbourg jurisprudence does not necessarily mean to follow it if there are (perceived) good reasons not to do so was of great interest to lawyers in the United Kingdom, and especially but by no means limited to evidence scholars. The Supreme Court’s firm confirmation that there should be no rule barring the prosecution from intro-

<sup>48</sup> *Ibid.*, at para. 36.

<sup>49</sup> *Ibid.*, at para. 39.

<sup>50</sup> *Ibid.*, at para. 92.

<sup>51</sup> *Ibid.*, at para. 41, referring to the analysis of the position in these jurisdictions presented in Annex 1.

<sup>52</sup> *Ibid.*, at para. 62.

<sup>53</sup> *Ibid.*, at para. 90.

<sup>54</sup> Presented in Annex 4.

<sup>55</sup> *Ibid.*, at para. 93.

<sup>56</sup> *Ibid.*, at para. 108.

ducing crucial hearsay evidence that the defendant had never had an adequate opportunity to “test” by means of cross-examination clearly had the potential to result in the law in England and Wales, and the Strasbourg jurisprudence, travelling along divergent paths. An opportunity for further consideration, however, arose. In the light of the decision in *Horncastle*, the European Court of Human Rights accepted the United Kingdom’s request for *Al-Khawaja and Tahery v. UK* to be referred to the Grand Chamber of the Court, which delivered its judgment in December 2011.<sup>57</sup>

### (b) A Resolution?

The Grand Chamber held that there were three steps to be taken in an inquiry into compliance with the European Convention on Human Rights in cases such as this.<sup>58</sup>

#### (i) *Is there a “good reason” for admitting the hearsay evidence?*

The Grand Chamber considered that “[t]he requirement that there be a good reason for admitting the evidence of [the] absent witness is a preliminary question” which must be satisfied regardless of the importance of the evidence. Failure to demonstrate good reason for admitting the evidence will automatically result in a violation of the Convention regardless of whether the evidence is sole or decisive.<sup>59</sup> This appears to mirror closely the necessity criterion in Canadian law.

#### (ii) *If so, is the hearsay evidence the sole or decisive evidence?*

The Grand Chamber offered a robust rebuttal of the views expressed by the UK Supreme Court in *Horncastle* about the difficulty of determining whether evidence is sole or decisive. In essence, the Grand Chamber pointed out that:

once the prosecution has concluded its case, the significance and weight of the untested evidence can be assessed by the trial judge against the background of the other evidence against the accused. In common law systems, at the conclusion of the prosecution case, trial judges are frequently asked to consider whether there is a case to answer against the accused. As part of that process they are often asked to assess the strength and reliability of the

<sup>57</sup> [2011] ECHR 26766/05 and 22228/06. See generally Antje du Bois-Pedain, “Hearsay Exceptions and Fair Trial Rights in Strasbourg” [2012] *Cambridge Law Journal* 257; Jane Elliott-Kelly, “Case Comment: *Al-Khawaja and Tahery v. United Kingdom*” [2012] *European Human Rights Law Review* 81; Rona Epstein and Steve Foster, “Hearsay Evidence: When is it Admissible?” (2012) 176 *Criminal Law and Justice Weekly* 447; Peter FitzGerald, “Absent Witnesses: *Al-Khawaja* Revisited” (2012) 176 *Criminal Law and Justice Weekly* 183; Mike Redmayne, “Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber” (2012) 75 *Modern Law Review* 865; J. R. Spencer, “Hearsay Evidence at Strasbourg: A Further Skirmish, or the Final Round? A Comment on *Al-Khawaja and Tahery v. UK* in the Grand Chamber” [2012] 1 *Archbold Review* 5.

<sup>58</sup> See also the summary of relevant principles provided by the European Court of Human Rights in *Štefančič v. Slovenia*, [2012] ECHR 18027/05, at para. 37.

<sup>59</sup> [2011] ECHR 26766/05 and 22228/06, at para. 120.

evidence for the prosecution. Indeed, the Court notes that section 125 of the 2003 Act expressly requires the trial judge to stop the case if, considering its importance to the case against the defendant, the hearsay evidence is so unconvincing that a conviction would be unsafe.<sup>60</sup>

The Grand Chamber considered that “the word ‘decisive’ should be . . . understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.”<sup>61</sup> In turn, the Grand Chamber’s reasoning and formulation did not find favour with the Court of Appeal of England and Wales, which noted that testing the strength and reliability of evidence is not, in fact, part of the trial judge’s role when considering a submission of no case to answer: “He only has to decide whether the prosecution must fail for lack of evidence, or because the evidence overall is of such a weak and tenuous nature that no properly directed jury could reasonably convict on the basis of it.”<sup>62</sup> The Court of Appeal considered that “a more useful test” might be whether “[t]he statement [in question is] a necessary (although not necessarily sufficient) pre-condition of bringing the case to trial,” or whether it is “the central piece of evidence without which the case could not proceed.”<sup>63</sup>

It may be that, as in many other contexts, it will be futile to attempt a watertight definition, and that much must ultimately be left to the good sense of individual trial judges. To give “decisive” a highly restrictive interpretation might well be to undermine article 6(3)(d) substantially. After all, if the evidence at issue is deemed not to be decisive, the protection potentially afforded by article 6(3)(d) falls away completely. Trial judges should therefore incline in favour of treating as “decisive” any evidence that they conceive of being capable of being accorded substantial weight by the jury. Perhaps a useful analogy might be drawn here to section 77(1) of PACE, which provides that, in a jury trial where:

(a) the case against the accused depends *wholly or substantially* on a confession by him or her; *and*

(b) the court is satisfied that he or she is mentally handicapped *and* that the confession was not made in the presence of an independent person,

the court is to warn the jury of the special need for caution before convicting the accused in reliance on the confession.<sup>64</sup> In *R. v. Campbell (Oliver Keith)* the Court of Appeal noted that a case against the accused depends “substantially on a confession” if the case for the prosecution would be “substantially less strong” without the confession.<sup>65</sup> This might provide useful guidance here. If the prosecution case

<sup>60</sup> *Ibid.*, at para. 134.

<sup>61</sup> *Ibid.*, at para. 131.

<sup>62</sup> *R. v. Ibrahim (Dahir)*, [2012] EWCA Crim 837, at para. 77.

<sup>63</sup> *Ibid.*, at para. 78. The latter formulation had its origins in Spencer, “Hearsay Evidence at Strasbourg”, at p. 7.

<sup>64</sup> Section 77(2) and section 77(2A) make analogous provision for trials without a jury: if a warning would be required if the trial were with a jury, the court is to treat the case as one in which there is a special need for caution before convicting the accused on the confession.

<sup>65</sup> (1994), [1995] 1 Cr. App. R. 522 at p. 535.



would be “substantially less strong” than it would be without the hearsay evidence in question, then the evidence should be regarded as decisive.

(iii) *If so, has “the most searching scrutiny” for “sufficient counterbalancing factors” been undertaken?*

Most crucially, the Grand Chamber in *Al-Khawaja and Tahery* went on to state that, even if the evidence is “sole or decisive,” its admission “will not automatically result in a breach,” *but*

the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, . . . and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case.<sup>66</sup>

### (c) Application of the Principles

Applying these principles to the facts of the cases at hand, the Grand Chamber found “good reason” in both cases for the admission in evidence of the witness statements in question: in *Al-Khawaja’s* case “S.T.’s death made it necessary to admit her witness statement if her evidence was to be considered,”<sup>67</sup> while, in *Tahery’s* case, “[e]ven though T.’s identity as the maker of the incriminating statement was publicly disclosed, . . . T. had a genuine fear of giving oral evidence and was not prepared to do so even if special measures were introduced in the trial proceedings.”<sup>68</sup> Furthermore, the evidence in both cases was decisive: in *Al-Khawaja’s* case the trial judge had taken the view that in its absence a successful prosecution in respect of count one would not be possible,<sup>69</sup> while in *Tahery’s* case the evidence “was obviously . . . of great weight and without it the chances of a conviction would have significantly receded.”<sup>70</sup> The final issue therefore was whether there were sufficient counterbalancing factors. On this question the Grand Chamber held, in the case of *Al-Khawaja*, that, having regard to the judge’s direc-

<sup>66</sup> [2011] ECHR 26766/05 and 22228/06, at para. 147.

<sup>67</sup> *Ibid.*, at para. 153.

<sup>68</sup> *Ibid.*, at para. 159. Notably, the dissenting judges were not convinced that there was good reason to admit the evidence in either case ([2011] ECHR 26766/05 and 22228/06, Opinion of Judges Sajó and Karakaş at para. 18): “S.T.’s suicide in *Al-Khawaja* and T.’s refusal in *Tahery* to testify in court for fear of being branded an informer in his community are clearly distinguishable from cases involving child abuse victims or organised crime prosecutions, both of which involve an unusual need to shield the witness from the defendant. Special caution may well be needed where key witnesses die or are intimidated as a result of the defendant’s actions. *Al-Khawaja* and *Tahery*, however, do not constitute such cases.”

<sup>69</sup> [2011] ECHR 26766/05 and 22228/06, at para. 154.

<sup>70</sup> *Ibid.*, at para. 160.

tion to the jury and to the prosecution evidence supporting the relevant hearsay statement (such evidence consisting of the testimonies of the two friends of S.T.'s to whom she had complained promptly, and the testimony of V.U. in respect of the other count), "the jury were able to conduct a fair and proper assessment of the reliability of S.T.'s allegations against [Al-Khawaja]."71 Thus, "notwithstanding the difficulties caused to the defence by admitting the statement and the dangers of doing so, there were sufficient counterbalancing factors to conclude that the admission in evidence of S.T.'s statement did not result in a breach of Article 6 §1 read in conjunction with Article 6 §3 (d) of the Convention."72 In the case of Tahery, on the other hand, the Grand Chamber found a violation of article 6(1) read in conjunction with article 6(3)(d) because "the decisive nature of T.'s statement in the absence of any strong corroborative evidence in the case meant the jury in this case were unable to conduct a fair and proper assessment of the reliability of T.'s evidence. Examining the fairness of the proceedings as a whole, the Court concludes that there were not sufficient counterbalancing factors to compensate for the difficulties to the defence which resulted from the admission of T.'s statement."73

#### (d) Implications

Is the Grand Chamber judgment in *Al-Khawaja and Tahery* justifiable, or is it essentially a pragmatic compromise? A number of reflections on the judgment may be made.

##### (i) *Whether the evidence is "sole or decisive" remains an important consideration*

While the fact that the evidence is "sole or decisive" is not determinative, it is clear that, unlike the Supreme Court in *Horncastle*, the Grand Chamber regards it as a factor of fundamental importance. It remains "a very important factor" which triggers "the most searching scrutiny." The terminology used by the Grand Chamber suggests that it was keen not to be perceived to be endorsing a low level of protection.

##### (ii) *Identifying "sufficient counterbalancing factors"*

Clearly, whether "sufficient counterbalancing factors" can be identified may well be of critical importance to the outcome of a case. The dissenting judges in the Grand Chamber in *Al-Khawaja and Tahery*, however, took a different approach, emphasizing their desire to remain faithful to the wording of article 6(3)(d), "an expressly granted Convention right,"74 as far as possible. They pointed out that to

71 *Ibid.*, at para. 157.

72 *Ibid.*, at para. 158.

73 *Ibid.*, at para. 165. The Criminal Cases Review Commission has referred Tahery's conviction to the Court of Appeal on the basis that there is now a real possibility that the Court will find that his conviction is unsafe and should be quashed: online: <<http://www.justice.gov.uk/news/press-releases/ccrc/the-criminal-case-review-commission-refers-the-conviction-of-ali-tahery-to-the-court-of-appeal>>

74 [2011] ECHR 26766/05 and 22228/06, Opinion of Judges Sajó and Karakaş at para. 25.

require that a defendant be afforded an adequate opportunity to cross-examine, at some point, the maker of a “sole or decisive” hearsay statement *already* represents a concession; a literal interpretation of article 6(3)(d) would require such an opportunity to be provided in respect of the maker of *any* hearsay statement, whether sole or decisive. Thus, in the view of the dissenting judges, it would be a step too far to permit, additionally, the consideration of counterbalancing factors.<sup>75</sup>

The stance of the dissenting judges clearly has a simple logic. Furthermore, there are strong arguments that can be put in favour of a rule-based approach that avoids the need to balance competing factors to determine whether the evidence in question is sufficiently reliable. As the US Supreme Court noted in *Crawford v. Washington*:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . . Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.<sup>76</sup>

Accordingly, the Court held that the Confrontation Clause requires that “[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, *and* . . . the defendant has had a prior opportunity to cross-examine.”<sup>77</sup> A “testimonial statement” is one that was:

prepared for the primary purpose of accusing a targeted individual. . . . In identifying the primary purpose of an out-of-court statement, we apply an objective test. . . . We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances.<sup>78</sup>

While the approach of the dissenting judges in *Al-Khawaja and Tahery*, and that of the US Supreme Court, avoid the need for individualized determinations of reliability, the exercise of judgment remains necessary to determine, in the case of the former, whether the evidence in question is “sole or decisive,” and, in the case of the latter, whether it constitutes “testimonial evidence.”

### (iii) *Taking evidence on commission?*

The “ideal” counterbalancing factor, and the one already accepted by the European Court of Human rights prior to the Grand Chamber judgment in *Al-Khawaja and Tahery*, is the provision of an adequate opportunity for the defendant to cross-examine the maker of the statement at an earlier date. This suggests the wisdom of

<sup>75</sup> “[The approach of the majority] amounts to asking for an exception to what is already the exception”: *ibid.*, at para. 15.

<sup>76</sup> 541 U.S. 36 at p. 63 (U.S. Sup. Ct., 2004).

<sup>77</sup> *Ibid.*, at p. 59 (italics added). See also *Davis v. Washington*, 547 U.S. 813 (U.S. Sup. Ct., 2006); *Indiana v. Edwards*, 554 U.S. 164 (U.S. Sup. Ct., 2008); *Giles v. California*, 554 U.S. 353 (U.S. Sup. Ct., 2008); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (U.S. Sup. Ct., 2009); *Michigan v. Bryant*, 131 S.Ct. 1143 (U.S. Sup. Ct., 2011); *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (U.S. Sup. Ct., 2011); *Williams v. Illinois*, 132 S.Ct. 2221 (U.S. Sup. Ct., 2012) (noted in (2012) 126 Harvard Law Review 266).

<sup>78</sup> *Williams v. Illinois*, 132 S.Ct. 2221 at p. 2243 (U.S. Sup. Ct., 2012).

a procedure whereby “the evidence of a witness who might become unavailable can be recorded with due formality before a judge, at a session where the defence are represented and able to put their questions.”<sup>79</sup> In England and Wales there is no general procedure for evidence to be “taken on commission” in this way, a situation that Professor John Spencer has regularly compared unfavourably with that prevailing in a number of other jurisdictions.<sup>80</sup> One of these is neighbouring Scotland, where section 272(1)(b)(i) of the *Criminal Procedure (Scotland) Act 1995* provides for “the appointment of a commissioner to examine, at any place in the United Kingdom, Channel Islands, or Isle of Man, a witness who . . . by reason of being ill or infirm is unable to attend the trial diet.” In *HM Advocate v. M.*<sup>81</sup> the defendant was charged, *inter alia*, with fraud and theft. An application was made to take the evidence of five alleged victims on commission. These individuals were aged 83, 71, 82, 87, and 92. More importantly, they were housebound. The defence argued that the witnesses should be required to give evidence from their homes through live television links. Accepting the prosecution’s argument that “[a] live television link from a person’s home was simply not achievable given the resources deployed by the Scottish Court Service,”<sup>82</sup> the facility being available at designated sites only,<sup>83</sup> the court granted the application for the evidence to be taken on commission.<sup>84</sup>

It is notable that, in a similar vein, section 709(1)(a) of the *Canadian Criminal Code* permits a party to “apply for an order appointing a commissioner to take the evidence of a witness who . . . is, by reason of (i) physical disability arising out of illness, or (ii) any other good and sufficient cause, not likely to be able to attend at the time the trial is held.”<sup>85</sup> Indeed, the Supreme Court of Canada noted in *R. v. Khelawon* that, while the necessity for the introduction of the hearsay evidence in the case at hand was conceded, there might be cases where the failure to obtain evidence on commission is relevant in considering the necessity criterion: “in an appropriate case, the court in deciding the question of necessity may well question whether the proponent of the evidence made all reasonable efforts to secure the evidence of the declarant in a manner that also preserves the rights of the other party.”<sup>86</sup> In *R. v. Campoli*,<sup>87</sup> the defendant, a personal support worker, was charged with assaulting a resident of a senior citizens retirement residence. The alleged victim, who was 97-years-old at the time of the allegations, gave a videotaped witness statement to the police in less than ideal conditions. As the alleged victim later

<sup>79</sup> See, e.g., Spencer, *Hearsay Evidence in Criminal Proceedings*, at p. 57. See also Maffei, *The Right to Confrontation in Europe*, at pp. 50, 88, 162-163, 228-229.

<sup>80</sup> See, e.g., Spencer, *Hearsay Evidence in Criminal Proceedings*, at pp. 57-60, 218-219.

<sup>81</sup> [2009] HCJ 5.

<sup>82</sup> *Ibid.*, at para. 11.

<sup>83</sup> *Ibid.*, at para. 4.

<sup>84</sup> *Ibid.*, at para. 12.

<sup>85</sup> See, generally, Bryant, Lederman, and Fuerst, *The Law of Evidence in Canada*, at pp. 41-42.

<sup>86</sup> 2006 SCC 57, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1, at para. 104.

<sup>87</sup> 2009 ONCJ 231, 2009 CarswellOnt 2824 (Ont. C.J.).

died, the issue arose of whether the statement was admissible in evidence. The court found that “this is one of those cases where the failure of the Crown to take reasonable steps to preserve the complainant’s evidence under [section 709 and other applicable provisions of the] *Criminal Code* . . . is a relevant consideration in assessing . . . necessity,”<sup>88</sup> further observing:

Under [the prevailing] circumstances, the advanced age of Ms. Gosling being the most paramount consideration, the Crown should have taken reasonable steps to ensure that Ms. Gosling’s evidence was preserved pursuant to [section 709 and other applicable provisions] of the *Criminal Code*. . . . [A]pproximately four months elapsed between the date of the allegations and Ms. Gosling’s death. There was ample time, before her death, for the Crown to take reasonable steps, pursuant to [section 709 and other applicable provisions] of the *Criminal Code*, to preserve her evidence. For this reason, . . . the necessity prerequisite has not been met.<sup>89</sup>

Accordingly, the statement was held to be inadmissible in evidence even though, in fact, the reliability criterion was satisfied in respect of part of the statement.<sup>90</sup>

There are important lessons to be learned here for England and Wales. Even if the circumstances in which a procedure for taking evidence on commission might be useful will necessarily be limited,<sup>91</sup> its availability in England and Wales would go some way in ensuring the reliability of admitted hearsay evidence, and in preventing the unnecessary admission of hearsay evidence. In the spirit of *Campoli*, the application of the first stage of the *Al-Khawaja and Tahery* inquiry would disentitle the prosecution from relying on hearsay evidence where a procedure for taking evidence on commission was not invoked in circumstances where there was no good reason for not doing so.

(iv) *Epistemic considerations only?*

Notably, the Grand Chamber in *Al-Khawaja and Tahery* would seem to view the right guaranteed by article 6(3)(d) only in epistemic terms. Its value is seen solely in terms of its potential to protect against the admission of unreliable evidence. There is no reference to whether, independently of concerns about the relia-

<sup>88</sup> *Ibid.*, at para. 16.

<sup>89</sup> *Ibid.*, at para. 18.

<sup>90</sup> *Ibid.*, at para. 28. Under the procedure in Italy, “parties may require the collection of testimony in a dedicated pre-trial hearing termed *incidente probatorio* when there are good reasons to believe that the witness will be unavailable at a later stage, or when the quality of his or her evidence is likely to deteriorate. Examination of witnesses at the *incidente probatorio* conforms to adversarial principles: witnesses are sworn, examined in chief by the summoning party and cross-examined by the adverse party. . . . The examination is recorded and included in the court dossier in the case of a later committal for trial”: Maffei, *The Right to Confrontation in Europe*, at pp. 162-163.

<sup>91</sup> “A mechanism for taking the evidence of . . . a witness ‘on commission’ would not, of course, solve all the problems. The witness might still be intimidated or become otherwise unavailable before the formal deposition could be taken. However, it would help to solve the problem of the witness who is unavailable in some cases”: Spencer, *Hearsay Evidence in Criminal Proceedings*, at p. 60.

bility of evidence, the right might be justified by reference to non-epistemic considerations.<sup>92</sup> Yet, arguably, “[t]he idea that one who accuses another of wrong ought to do so in a forum where he assumes the consequences of his statement has sufficient power that no amount of cynical sneering about . . . the value of cross-examination [or of the observation of demeanour] will suffice to overcome it as an important symbol of fairness.”<sup>93</sup>

### (e) The Aftermath of *Al-Khawaja and Tahery*

In the fourteen months that have elapsed (at the time of writing) since the Grand Chamber judgment in *Al-Khawaja and Tahery* was delivered, the European Court of Human Rights<sup>94</sup> and the Court of Appeal of England and Wales<sup>95</sup> have considered the judgment on a number of occasions, with the Court of Appeal in *R. v. Riat (Jaspal)*<sup>96</sup> providing the most sustained “domestic” discussion of the implications of the judgment to date. A few points emerging from these cases deserve attention.

In a considerable number of cases the European Court of Human Rights found that there was no “good reason” for admitting the hearsay evidence at issue (and therefore that the preliminary question to be examined in the determination of ad-

<sup>92</sup> For a full discussion of non-epistemic justifications for the hearsay rule, see Andrew L.-T. Choo, *Hearsay and Confrontation in Criminal Trials* (Oxford: Oxford University Press, 1996) at pp. 37–42.

<sup>93</sup> Kenneth W. Graham, Jr., “The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One” (1972) 8 *Criminal Law Bulletin* 99 at p. 133. See, however, Mike Madden, “Anchoring the Law in a Bed of Principle: A Critique of, and Proposal to Improve, Canadian and American Hearsay and Confrontation Law” (2012) 35 *Boston College International and Comparative Law Review* 395 at pp. 442–444.

<sup>94</sup> *Nechto v. Russia*, [2012] ECHR 24893/05; *Karpenko v. Russia*, [2012] ECHR 5605/04; *Chmura v. Poland*, [2012] ECHR 18475/05; *Gabrielyan v. Armenia*, [2012] ECHR 8088/05; *Fąfrowicz v. Poland*, [2012] ECHR 43609/07; *Sibgatullin v. Russia*, [2012] ECHR 1413/05; *Salikhov v. Russia*, [2012] ECHR 23880/05; *Aigner v. Austria*, [2012] ECHR 28328/03; *Trampevski v. Former Yugoslav Republic of Macedonia*, [2012] ECHR 4570/07; *Vidgen v. Netherlands*, [2012] ECHR 29353/06; *Hümmer v. Germany*, [2012] ECHR 26171/07; *Mitkus v. Latvia*, [2012] ECHR 7259/03; *Štefančič v. Slovenia*, [2012] ECHR 18027/05; *Asadbeyli and Others v. Azerbaijan*, [2012] ECHR 3653/05, 14729/05, 20908/05, 26242/05, 36083/05, and 16519/06.

<sup>95</sup> *R. v. J.*, [2011] EWCA Crim 3021 (see generally Roger Sahota and Tim Welch, “Clarifying the Hearsay Rule?” (2012) 176 *Criminal Law and Justice Weekly* 133); *R. v. Horsnell (Michael Peter)*, [2012] EWCA Crim 227; *R. v. Ibrahim (Dahir)*, [2012] EWCA Crim 837; *R. v. Riat (Jaspal)*, [2012] EWCA Crim 1509 (see generally Michael Stockdale and Andrea O’Cain, “The Admissibility of Hearsay Evidence” (2012) 176 *Criminal Law and Justice Weekly* 697); *R. v. Fagan (Taariq)*, [2012] EWCA Crim 2248; *R. v. Shabir*, [2012] EWCA Crim 2564; *R. v. Friel (Christopher)*, [2012] EWCA Crim 2871; *R. v. Adejo (Sodiq)*, [2013] EWCA Crim 41.

<sup>96</sup> [2012] EWCA Crim 1509.

missibility had not been satisfied).<sup>97</sup> For example, the Court held in *Nechto v. Russia*:

Regard being had to the circumstances of the case, the Court has serious doubts that the decision of the domestic courts to accept their explanations and excuse their absence from the proceedings could indeed be accepted as justified. It considers that the domestic courts reviewed the reasons advanced by the competent police authorities and the witnesses superficially and uncritically. Whilst such reasons as the alleged remoteness of the location of the trial, fear for their lives or absence from their registered address . . . could be seen as relevant, the courts did not go into the specific circumstances of the situation of each witness and failed to examine whether any alternative means of securing their giving evidence in person would have been possible and sufficient. It follows that the decision to excuse the absence of these witnesses was not sufficiently convincing and that the authorities failed to take reasonable measures to secure their attendance at the trial.<sup>98</sup>

In some of these cases, however, the Court indicated that, in any event, there were insufficient counterbalancing factors.<sup>99</sup> It is interesting that the Court of Appeal in *R. v. Fagan (Taariq)* emphasized, *obiter*, the desirability of making every effort to bring a reluctant witness to court:

It would have been wise to secure at court the attendance of Mr Stephens. Whether or not the Crown felt it a pointless exercise or that the usual familiar steps would so increase the pressure on Mr Stephens as to make it less likely he would give evidence, it would have been wise for the court to ensure he was brought. If he were not willing, for example, to accept a generous offer by a police officer to bring him, then there were steps through which the court could have gone to ensure his attendance. Experience teaches that a reluctant witness once in a court building can often be reassured and will then give evidence. . . . Mr Stephens should have been brought to court by whatever appropriate means because there was a good chance that once there he would consent to give evidence.<sup>100</sup>

<sup>97</sup> *Nechto v. Russia*, [2012] ECHR 24893/05; *Karpenko v. Russia*, [2012] ECHR 5605/04; *Gabrielyan v. Armenia*, [2012] ECHR 8088/05; *Sibgatullin v. Russia*, [2012] ECHR 1413/05; *Salikhov v. Russia*, [2012] ECHR 23880/05; *Trampevski v. Former Yugoslav Republic of Macedonia*, [2012] ECHR 4570/07; *Asadbeyli and Others v. Azerbaijan*, [2012] ECHR 3653/05, 14729/05, 20908/05, 26242/05, 36083/05, and 16519/06.

<sup>98</sup> [2012] ECHR 24893/05, at para. 127.

<sup>99</sup> *Sibgatullin v. Russia*, [2012] ECHR 1413/05; *Salikhov v. Russia*, [2012] ECHR 23880/05; *Trampevski v. Former Yugoslav Republic of Macedonia*, [2012] ECHR 4570/07; *Asadbeyli and Others v. Azerbaijan*, [2012] ECHR 3653/05, 14729/05, 20908/05, 26242/05, 36083/05, and 16519/06.

<sup>100</sup> [2012] EWCA Crim 2248, at para. 51.

Notably, on a number of occasions, the European Court of Human Rights<sup>101</sup> and the Court of Appeal<sup>102</sup> have found the evidence at issue not to be sole or decisive. In two such cases the European Court acknowledged that the conclusion that there was no violation of the Convention could also be justified on the basis that there were, in any event, sufficient counterbalancing factors.<sup>103</sup> Again, it is interesting to note the Court's desire to demonstrate that it was able to justify its holding on more than one ground.

Significantly, the Court of Appeal has clarified that the search for "sufficient counterbalancing factors" does not require the trial judge to determine whether the sole or decisive hearsay evidence is *actually* reliable; there is no "general rule that [such] evidence has to be shown (or 'demonstrated') to be reliable before it can be admitted, or before it can be left to the jury."<sup>104</sup> Rather, what is required is that the "evidence be shown to be *potentially* safely reliable before it can be admitted."<sup>105</sup> In a similar vein, the Supreme Court of Canada has emphasized that the trial judge's concern is with determining threshold reliability and not ultimate reliability: "Trial judges must be aware of the limited role they play in determining admissibility. It is essential to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire* . . ."<sup>106</sup>

In *Al-Khawaja and Tahery v. UK*, the finding of Convention breaches in respect of Tahery but not in respect of Al-Khawaja suggests that the existence of corroboration may well constitute an important "counterbalancing factor." In a similar vein, the European Court of Human Rights subsequently found Convention breaches in *Hümmer v. Germany* on the basis that "the decisive nature of [evidence of] the witnesses' statements . . . in the absence of any strong corroborative evidence meant that the trial court in the instant case was unable to conduct a fair and

<sup>101</sup> *Fąfrowicz v. Poland*, [2012] ECHR 43609/07; *Mitkus v. Latvia*, [2012] ECHR 7259/03; *Štefančič v. Slovenia*, [2012] ECHR 18027/05.

<sup>102</sup> See *R. v. J.*, [2011] EWCA Crim 3021, at para. 13 ("We think that it would have been open to the jury to convict the applicant even without the evidence of what B told A or her mother about what the applicant had done to him. Once the many injuries which had been seen by the paediatric registrar on 19 February were regarded as having been caused non-accidentally, the only possible candidates for causing those injuries were A, her mother and the applicant. Both A and her mother gave evidence that it had not been them. If the jury believed them, it had to have been the applicant who was responsible"); *R. v. Horsnell (Michael Peter)*, [2012] EWCA Crim 227; *R. v. Riat (Jaspal)*, [2012] EWCA Crim 1509, at para. 79, regarding Bennett's case, which was conjoined with Riat's ("The truth was that the case could be proved against the defendant without [the complainant's] evidence at all, by relying on the messages and cards which he had sent her, the initial lies to the police and then the explicit confessions which, in the police interviews . . ., could not be other than confessions to penetrative sexual activity").

<sup>103</sup> *Mitkus v. Latvia*, [2012] ECHR 7259/03; *Štefančič v. Slovenia*, [2012] ECHR 18027/05.

<sup>104</sup> *R. v. Riat (Jaspal)*, [2012] EWCA Crim 1509, at para. 5.

<sup>105</sup> *R. v. Ibrahim (Dahir)*, [2012] EWCA Crim 837, at para. 107 (italics added).

<sup>106</sup> *R. v. Blackman*, 2008 SCC 37, 2008 CarswellOnt 3722, 2008 CarswellOnt 3723, [2008] 2 S.C.R. 298, 232 C.C.C. (3d) 233, 57 C.R. (6th) 12, at para. 56 (S.C.C.).



proper assessment of the reliability of such evidence.”<sup>107</sup> The possibility arises of the emergence of a principle requiring “sufficient counterbalancing” to assume the form of corroboration, crystallizing into a rule that sole or decisive hearsay evidence must be corroborated. The Court of Appeal of England and Wales would appear to have distanced itself from the endorsement of any such view, stating in *R. v. Riat (Jaspal)*: “[A] pre-condition that the hearsay be shown independently to be accurate”<sup>108</sup> “would mean that hearsay evidence has to be independently verified before it can be admitted or left to the jury. That would be to re-introduce the abolished rules for corroboration . . .”<sup>109</sup> It is notable that, in Canada, there was for a time uncertainty about the relevance of corroboration in the determination of threshold reliability. Referring to the debate on whether the trial judge should be confined to a consideration of the circumstances surrounding the making of the statement, or whether the presence or absence of evidence corroborating the statement was also a relevant factor, the Supreme Court of Canada noted that “it has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement.”<sup>110</sup> Thus:

in appropriate circumstances, a corroborative item of evidence can be considered in assessing the threshold reliability of a statement. Consider, on the one hand, the hearsay statement of a complainant who asserts that she was repeatedly stabbed but has no injury to show in support. The lack of corroborative evidence would seriously undermine the trustworthiness of the statement and, indeed, would likely be fatal to its admissibility. On the other hand, an item of corroborative evidence can also substantiate the trustworthiness of a statement. . . . Where an item of evidence goes to the trustworthiness of the statement, . . . it should no longer be excluded simply on the basis that it is corroborative in nature.<sup>111</sup>

The Canadian jurisprudence may well provide the courts in England and Wales with useful perspectives on the role of corroboration in this context, and the caution with which the issue of corroboration should be approached.

In essence, a determination of whether there are “sufficient counterbalancing factors” involves, in the view of the Court of Appeal of England and Wales, a consideration of:

both (i) the extent of risk of unreliability and (ii) the extent to which the reliability of the evidence can safely be tested and assessed. We give simple examples only [of relevant factors], which are in no sense exhaustive. The circumstances of the making of the hearsay statement may be such as to reduce the risk of unreliability, for example if it is spontaneous . . . The disinterest of the maker of the statement may reduce the risk of deliberate untruth. Independent dovetailing evidence may reduce the risk both of deliberate untruth and of innocent mistake . . . The availability of good testing

<sup>107</sup> [2012] ECHR 26171/07, at para. 53.

<sup>108</sup> [2012] EWCA Crim 1509, at para. 25.

<sup>109</sup> *Ibid.*, at para. 5.

<sup>110</sup> *R. v. Khelawon*, 2006 SCC 57, 2006 CarswellOnt 7825, 2006 CarswellOnt 7826, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1, at para. 100.

<sup>111</sup> *R. v. Blackman*, 2008 SCC 37, 2008 CarswellOnt 3722, 2008 CarswellOnt 3723, [2008] 2 S.C.R. 298, 232 C.C.C. (3d) 233, 57 C.R. (6th) 12, at para. 55.

material . . . concerning the reliability of the witness may show that the evidence can properly be tested and assessed. So may independent supporting evidence.<sup>112</sup>

Notably, the Court found insufficient counterbalancing factors in *R. v. Ibrahim (Dahir)*<sup>113</sup> and *R. v. Shabir*.<sup>114</sup> The latter concerned, *inter alia*, the admissibility in evidence of a statement made by one Rafique on September 25, 2010, about a shooting incident the previous day. In holding that “it cannot be shown that the untested hearsay evidence of Rafique on the central issue of the identification of the appellant as the gunman in the Summerville Road incident was potentially safely reliable,”<sup>115</sup> the Court was influenced by a number of factors:

. . . Rafique had a history of mental illness, having been diagnosed with paranoid schizophrenia in 2010. . . . He also had previous convictions and he was a drug user. Those facts throw doubt on whether [his statement was] potentially safely reliable, although we accept that they are by no means conclusive in any particular case. . . . Rafique had given accounts of events in 2009 when he was arrested [in relation to alleged drug dealing] which were contrary to police statements of events. . . . [H]is identification in his . . . statement of the appellant as the gunman was contrary to the note in the police log . . . that Rafique had said that Asim . . . was the . . . person who had shot at him in Summerville Road. Lastly, Rafique was still giving contradictory accounts of whether he stood by his original witness statements.<sup>116</sup>

It is heartening that the Court of Appeal in *R. v. Fagan (Taariq)* considered that, with respect to the issue of “sufficient counterbalancing factors,” deference to the trial judge must have its limits: “[To subject] the evidence of an absent witness [to] the most searching scrutiny . . . could not be accomplished were this court to refuse to reverse after review a decision with which it disagreed, solely in the interest of respecting the view of the trial judge. Section 6 of the *Human Rights Act* supports that argument.”<sup>117</sup>

## 5. CONCLUSION

At first sight, the law of criminal hearsay in England and Wales appears highly regulated, being governed by detailed statutory provisions and subject further to an express “confrontation” guarantee contained in the *European Convention on Human Rights*. The relevant law in Canada, by contrast, has developed in a more piecemeal fashion and is not subject to any express “confrontation” guarantee. Comparisons of the relevant law in England and Wales with that in Canada have largely been ignored in the academic literature, and it is hoped that the present article will have filled the gap and demonstrated that scholars and practitioners in each jurisdiction can gain valuable insights from the other. There is now a remarka-

<sup>112</sup> *R. v. Riat (Jaspal)*, [2012] EWCA Crim 1509, at para. 6.

<sup>113</sup> [2012] EWCA Crim 837.

<sup>114</sup> [2012] EWCA Crim 2564.

<sup>115</sup> *Ibid.*, at para. 72.

<sup>116</sup> *Ibid.*, at para. 70.

<sup>117</sup> [2012] EWCA Crim 2248, at para. 39.

ble convergence between the general principles underlying criminal hearsay doctrine in the two jurisdictions: in either, hearsay evidence may be admitted pursuant to specific exceptions that are supplemented by a “flexible” inclusionary power, which is governed by principles in the light of which the specific exceptions may usefully be interpreted, and which, indeed, may suggest that evidence rendered admissible by a specific exception ought to be excluded. In recent decades, the Canadian courts have had greater experience with refining the contours of criminal hearsay doctrine than have their counterparts in England and Wales, but the latter are catching up fast in the light of the introduction of the provisions of the *Criminal Justice Act 2003* and the influence of the *Human Rights Act 1998*. The current stream of jurisprudence emerging from the Court of Appeal of England and Wales may be expected to be supplemented by a (further) decision of the UK Supreme Court in due course.

*Al-Khawaja and Tahery v. UK* demonstrates that the fundamental dilemma may be stated simply: accepting the conventional wisdom that, ideally, the defence should be given, or should have been given, the opportunity to “test” by means of cross-examination hearsay evidence (or at least sole or decisive hearsay evidence) introduced by the prosecution, might alternative means of testing such evidence be permitted a very limited role or are they to be avoided entirely? The Grand Chamber’s pragmatic holding in favour of the former has allowed the courts in England and Wales to breathe a sigh of relief, confident that they have been given the green light to proceed with business as usual, as long as great(er) caution is exercised. Any further developments will be followed eagerly in England and Wales, and, it is hoped, with interest and profit in Canada as well.