

Absent minded

David Rhodes examines a decision by the Court of Appeal to reject a judgment of the European Court of Human Rights on the admissibility of hearsay evidence

“DID THEY REALLY say that?” In *Horncastle* [2009] EWCA Crim 964 (*Solicitors Journal*, 153/21, 2 June 2009), a special five-member Court of Appeal fundamentally reviewed the landscape of hearsay evidence under the Criminal Justice Act (“CJA”) 2003. In so doing, controversially, they declined to follow the judgment of the European Court of Human Rights in *Al-Khawaja and Tahery v UK* [2009] ECHR 26766/05.

A violation of Art.6

In *Al-Khawaja*, the Strasbourg court held that Art.6(1) and Art.6(3)(d) would be violated where the use of hearsay evidence, particularly by anonymous witnesses, was the sole or decisive basis for conviction. It said that “the court doubts whether any counterbalancing factors would be sufficient to justify” such untested evidence. The effect of that judgment was to drive a coach and horses through the scheme of counterbalancing considerations set out in the CJA 2003.

The Court of Appeal began by pointing out that s.2(1) of the Human Rights Act 1998 states that a court must “take into account” any judgment by the ECtHR, but they were not bound to follow it. The Court of Appeal was galvanised in its approach by the fact that the CJA 2003 represented the considered will of Parliament, after careful consideration and rejection of other approaches.

The court accepted that Art.6(3)(d) – the right to confront witnesses – was not a mere example of a fair trial, but added its own content to Art.6. However, it is not an absolute right. The court then examined the provisions of the CJA in detail and distilled seven key propositions. First, that admissibility of evidence is a matter for the national court. Second, that the ordinary rule must be that witnesses are examined in court – that hearsay is inadmissible unless there is specific provision for it. Third, that ‘witness’ has an autonomous meaning and includes those who gave information to the police. Fourth, there may be circumstances which justify a departure from the second proposition. Fifth, in departing from the right to confrontation, the Convention rights of witnesses under Arts.2, 3 and 8 are engaged and material. Sixth, if departure from the right was contemplated, it must not

be adopted without careful consideration of (a) the circumstances in which the out of court statements were made and (b) the reasons why the witness was not being called or made available for their evidence to be tested. Seventh, where evidence relied upon is not given orally by a witness who is available to be examined, the rights of the defence must be respected.

The Strasbourg approach

The Court of Appeal was critical of the Strasbourg approach in *Al-Khawaja*. The lords drew a distinction between hearsay evidence given by an anonymous witness and that given by an identified witness who is absent for good reason; such as death, illness, fear or because their evidence comprised of routine business records. The lords said, with respect, the Strasbourg court had unjustifiably conflated the two and they were only concerned with the latter:

“Where the evidence before the court is that of an identified but absent witness, we can see no reason for a further absolute rule that no counterbalancing measures can be sufficient where the statement of the absent witness is the sole or decisive evidence against the defendant. That would include cases where the hearsay evidence was demonstrably reliable, or its reliability was capable of proper testing and assessment, thus protecting the rights of the defence and providing sufficient counterbalancing measures.”

The court said that there were fundamental problems in adopting the ‘sole or decisive’ test as an absolute test for exclusion. First, that assumed that all hearsay evidence which is critical to a case will be potentially unreliable in the absence of testing. The court said that often even crucial hearsay evidence would not be inherently unreliable. For example, a woman who is under attack manages to get to the phone and is recorded as screaming, “X is here, he’s got a knife” just before she is stabbed to death.

Secondly, the lords felt that a jury or other tribunal of fact is perfectly able to understand the limitations of hearsay evidence and determine what weight can

be attached to it.

Thirdly, there was a logical and practical flaw in the Strasbourg approach. The assessment of whether the hearsay evidence is the ‘sole or decisive’ factor in the conviction is necessarily retrospective. No one can know what evidence will be decisive until the decision-making process is over. Indeed, where that process is undertaken by a jury, we may never know what factor was decisive.

A fair trial

Ultimately, the question is whether the trial as a whole is fair and that decision cannot be made until the end of the evidence. The Court of Appeal said that the CJA 2003 provided ample safeguards. In particular, s.125 provides the trial judge with the power to withdraw the case from the jury if the case depends in whole or in part on hearsay evidence that is unconvincing and would render a conviction unsafe. The lords said that “it would not serve justice if this power were to be trammelled by a requirement that it be exercised in every case in which hearsay evidence were the sole or decisive factor”.

Accordingly, the Court of Appeal contradicted Strasbourg, holding: “There is no breach of Art.6, and in particular Art.6(3)(d), if the conviction is based solely or to a decisive degree on hearsay evidence admitted under the CJA 2003. There is nothing in our view in the judgment of the ECtHR in *Al-Khawaja* considered in the light of a full analysis of the CJA 2003 that leads us to conclude that this court was wrong in the result it reached in a number of its decisions in relation to Art.6 and Art.6(3)(d). Where the hearsay evidence is demonstrably reliable, or its reliability can properly be tested and assessed, the rights of the defence are respected, there are in the language of the ECtHR sufficient counterbalancing measures, and the trial is fair.”

The judgment of *Al-Khawaja and Tahery v UK* is to be referred to the Grand Chamber and thus the UK courts and Strasbourg are set on a collision course – so watch this space...

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