IN THE EUROPEAN COURT OF HUMAN RIGHTS **APP. NOs. 26766/05 and 22228/06**
B E T W E E N:-

AL-KHAWAJA AND TAHERY

Applicants

-v-

THE UNITED KINGDOM

Respondent Government

THIRD PARTY INTERVENTION SUBMISSIONS BY JUSTICE[1]

INTRODUCTION AND SUMMARY

1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance access to justice, human rights and the rule of law. It is the British section of the International Commission of Jurists and one of the leading civil liberties and human rights organisations in the UK. It welcomes the opportunity to intervene as a third party in this case, by the leave of the Court granted 16 March 2010.

2. In its recent decision in *R v Horncastle* [2010] UKSC 2, the UK Supreme Court invited the Grand Chamber to clarify the reasoning behind the so-called 'sole or decisive' rule under Article 6(3)(d) of the Convention, particularly as it was applied in the judgment of the Fourth Section in *Al-Khawaja*.

3. Among other things, the Supreme Court suggested that there had been insufficient analysis in the Chamber's judgment in *Al-Khawaja* of 'the principle underlying [the sole or decisive rule]', as well as insufficient consideration of 'whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions'.[2] The Supreme Court also expressed the view that the sole or decisive rule would 'create severe practical difficulties if applied to English criminal procedure'.[3]

4. In light of the Supreme Court decision in *Horncastle*, JUSTICE submits that:

   (i) the Supreme Court significantly understated the importance of the hearsay rule in the common law tradition. The hearsay rule is, and remains, a central aspect of the common law right of confrontation. This can be seen both from its historical development, and its status in other major common law jurisdictions, including Australia, Canada, Hong Kong, New Zealand, Ireland, South Africa and the United States;

   (ii) the sole or decisive rule under Article 6(3)(d) reflects the essence of the common law right of confrontation. Accordingly, it is no less applicable to common law jurisdictions than it is to continental ones;

   (iii) it would violate this ancient right of confrontation and the right of cross-examination under Article 6(3)(d) for a person to be convicted solely or to a decisive extent upon uncross-examined testimony, regardless of how reliable it may otherwise appear;

   (iv) the Supreme Court overstated the extent to which the Criminal Justice Act 2003 implemented the recommendations of the Law Commission's 1997 report;

   (v) the Supreme Court erred in supposing that the apparent reliability of hearsay could be the sole determinant of compatibility with either Article 6(3)(d) or common law fairness; and

   (vi) the sole or decisive rule is far from unworkable in the criminal procedure of England and Wales. It is also central to limiting the unfairness of secret evidence and anonymous testimony.

5. As directed, these submissions do not comment on the facts or merits of the case.

BACKGROUND TO THE HEARSAY PROVISIONS OF THE CRIMINAL JUSTICE ACT 2003

6. The rule against hearsay is one of the oldest and best-known of the common law exclusionary rules of evidence. Despite the reforms introduced by the 2003 Act, it also remains the most complex.[4]

The hearsay rule and the common law right of confrontation

7. The origin of the rule against hearsay lies in the common law right of confrontation, which protects a number of interests, most notably (i) the defendant's interest in receiving a fair trial by being able to cross-examine the witnesses against him; and (ii) the court's interest in using the most reliable evidence to reach conclusions which are accurate, a witness's testimony being most reliable when it has been subjected to cross-examination.

8. The right of confrontation was, of course, not original to the common law but derived from Roman law, as the King James's Bible attests:[5]

> *It is not the manner of the Romans to deliver any man to die, before* that he which is accused have the accusers face to face*, and have licence to answer for himself concerning the crime laid against him.*

However, English common law attached particular importance to the idea of *face to face* confrontation between the accused and his accusers as a guarantee of both the reliability of evidence and the fundamental fairness of proceedings. As Lord Bingham noted in *R v Davis*, this principle was firmly established in the common law tradition during the medieval period, even while it became more attenuated in those continental legal systems actually based on Roman law.[6] At his trial for treason in 1603, for instance, Sir Walter Raleigh famously complained that he had been denied the ordinary right to cross-examine Lord Cobham, whose sworn confession (obtained under torture) was the key evidence against him:[7]

> *Good my Lords,* let my accuser come face to face, and be deposed. *Were the case but for a small copyhold* [a deed of land], *you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!*

9. One major justification for excluding hearsay evidence was, therefore, that it would otherwise deprive the defendant of his right to confront the maker of the hearsay statement face to face.[8] In 1790, for example, the Lord Chief Justice Lord Kenyon observed that part of the unfairness of using hearsay lay in the inability of the defendant to challenge its accuracy:[9]

> *Examinations upon oath… are of no avail unless they are made in a cause or proceeding depending upon the parties to be affected by them, and where each has an opportunity of cross-examining the witness; otherwise it is* res inter alios acta*, and not to be received.*

10. Of equal concern was the inherent unreliability of hearsay itself. Jeremy Bentham, for instance, derided hearsay as 'unsworn, uninterrogated: if inaccurate, uncorrected; if imperfect, uncompleted'.[10] A fierce critic of exclusionary rules of evidence in general, he nonetheless argued for the exclusion of hearsay in most cases:[11]

> *Though the witnesses ought not to be excluded,* there are cases in which the testimony ought to be thrown out of doors: *(1) when it is not pertinent; (2)* when it is superfluous …. *Every testimony may accidentally turn out to be superfluous but there is one, which, except in a particular case,* expressly deserves *this designation, for,* to be superfluous in its essence: I mean hearsay.

Bentham's criticisms of hearsay were not limited to its intrinsic poor quality as evidence. In the case of character evidence, for instance, he argued that the use of hearsay would not only lead the court to inaccurate conclusions, but would also result in manifest unfairness to the accused:[12]

> Neither on this nor on any other occasion ought a man's reputation be liable to be destroyed or impaired by mere hearsay evidence. *If a punishable or otherwise disreputable act is to be charged upon a man, on this occasion as on others, the charge* ought to be made good by a satisfactory mass of evidence.

11. As one academic, Professor Peter Murphy, described it:[13]

> *The rule against hearsay originated in centuries-old judicial awareness that the admission of hearsay evidence involves two serious dangers. The first is that the repetition of any statement involves the inherent danger of error or distortion, which increases in proportion to the number of repetitions and the complexity of the statement. The second is that* it is virtually impossible to engage in effective cross-examination of a witness who is testifying about a hearsay statement, *because the witness did not perceive the events in question.*

Considering the various risks that hearsay involves, Murphy said, 'one can see why the common law set its face firmly against the admission of hearsay evidence'.[14] Professor Michael Zander QC similarly noted:[15]

> *The rule excluding hearsay evidence as inherently unreliable has been regarded as one of the essential features of the common law principle that a trial, especially in a criminal case, should be based on evidence given by live witnesses in open court* subject to cross examination.

12. The importance of the common law right of confrontation was such that it was given constitutional protection by many of the former British colonies in North America following their independence. The 1776 Virginia Constitution for instance provided:[16]

> *That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation,* to be confronted with the accusers and the witnesses…

This became the basis for the Sixth Amendment to the US Constitution, adopted in 1791, which guarantees defendants in criminal proceedings the right 'to be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him'. One consequence of the elevation of the right of confrontation to the level of a constitutional right was that it made explicit its relationship with the hearsay rule: whatever the admissibility of hearsay in general, it could not be used to deny a defendant his constitutional right to confront the witnesses against him.[17] Thus the eminent US jurist John Henry Wigmore described the common law rule against hearsay as:[18]

> *the most characteristic rule of the Anglo-American law of evidence – a rule which may be esteemed, next to jury trial, the greatest contribution of that eminently practical legal system to the world's methods of procedure.*

More recently, following a detailed examination of the English common law in its 2004 judgment of *Crawford v Washington*, the US Supreme Court unanimously reaffirmed that the Sixth Amendment requires the exclusion of the testimony of any witness whom the defendant has not had the opportunity to cross-examine:[19]

> *Where testimonial evidence is at issue … the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination …. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.*

13. The common law right to confront one's accuser shaped not only US fair trial guarantees but also the criminal procedure of all common law countries and, in the 20th century, the development of international human rights law. Indeed, it is widely assumed to be the basis for the right of a defendant in criminal proceedings under Article 6(3)(d) of the Convention to cross-examine the witnesses against him,[20] as well as the identical right under Article 14(3)(e) of the International Covenant on Civil and Political Rights. JUSTICE submits that the interests protected by Article 6(3)(d) are, in any event, the same as those protected by the common law right of confrontation.

Reforms to the hearsay rule

14. Although the main justifications for the common law prohibition of hearsay were concern at its general unreliability and unfairness, over time the prohibition itself came to be widely criticised for its complexity (it had numerous exceptions),[21] rigidity (there was no discretion to include material, no matter how probative and reliable it might appear), and its own tendency to produce injustice (it

excluded probative material both inculpatory and exculpatory). Although Parliament enacted limited reforms by way of the 1967 and 1988 Criminal Justice Acts, calls for comprehensive overhaul of the law continued to grow.

15. In our 1989 report entitled *Miscarriages of Justice*, for instance, JUSTICE criticised the rigid operation of the hearsay rule:[22]

> *It is a powerful argument against a strict exclusionary rule that miscarriages of justice can be avoided only if the appellant is lucky enough to find a court prepared to decide his case otherwise than according to the law.*

JUSTICE's report was subsequently cited by the Law Commission,[23] as well as by government ministers during parliamentary debates on the 2003 Act.[24] JUSTICE was also one of a number of organisations that responded to the Commission's 1995 consultation, agreeing with the general need to introduce reforms on the basis that the existing rule was too complex and confusing and liable to produce unfairness.[25]

16. The consultation was followed by the Law Commission's 1997 final report which recommended that the general exclusionary rule against hearsay should be maintained, but that the existing exceptions should be clarified, and a general inclusionary discretion introduced to allow the trial judge to admit otherwise inadmissible material where it was in 'the interests of justice'.[26] However, the Commission envisaged that such a discretion 'would only be used exceptionally'.[27]

17. In *Horncastle*, the Supreme Court said that the 2003 Act 'largely implemented'[28] and were 'essentially based' upon the recommendations of the Law Commission report.[29] It cited with approval the findings of the Court of Appeal that Parliament had 'with limited modifications adopted' the Law Commission's recommendations.[30] It also endorsed the appeal court's conclusion that the provisions of the 2003 Act were 'informed by experience accumulated over generations and represents the product of concentrated consideration by experts of how the balance should be struck between the many competing interests affected'.[31] Commenting upon the Chamber judgment in *Al Khawaja,* Lord Phillips doubted whether the Chamber had given 'detailed consideration' to the relevant English law 'and the changes made to that law, after consideration by the Law Commission'.[32]

18. However, although it is true that the Law Commission proposals 'drew widespread support from the judiciary and the legal profession',[33] JUSTICE submits that the Supreme Court overstated the extent to which the 2003 Act in fact implemented the recommendations of the Law Commission. Even while the Bill was still being debated in Parliament, JUSTICE and the Legal Action Group (another NGO) submitted a briefing to parliamentarians complaining that the Government had 'ridden roughshod over the concerns the Law Commission identified with hearsay evidence'.[34] This was despite the fact JUSTICE's support for overall reform of the hearsay rule was elsewhere cited with approval by government ministers during parliamentary debate on the hearsay proposals.[35] The disparity between the Law Commission's proposals and those of the government was noted by a number of peers at the Committee stage debate, leading in one case the House of Lords to reject the government's proposed inclusionary discretion.[36] It was only after the House of Commons agreed to compromise language that the provision was reinstated.[37]

19. Even so, many academics and practitioners have noted that the hearsay provisions of the 2003 Act remain more generous than those put forward by the Law Commission.[38] Accordingly, JUSTICE disputes the Supreme Court's description of the hearsay provisions of the 2003 Act as a 'crafted code' that was 'informed by experience accumulated over generations'. This may perhaps have been true of the Law Commission's own proposals, but it was not true of the 2003 Act.

20. The Supreme Court's sanguine assessment of legislation in this area is not limited to the 2003 Act. For instance, the Court in *Horncastle* notes that, as a result of the judgment of the House of Lords in *R v Davis* [2008] UKHL 36, 'Parliament amended the common law' by way of the Criminal Evidence (Witness Anonymity) Act 2008.[39] It also cites the 2008 Act as another example of how Parliament has sought alternatives to the 'draconian' sole or decisive rule.[40] However, the Supreme Court makes no mention of the fact that the 2008 Act was rushed through Parliament on an emergency basis in a mere 3 weeks, leading to criticism from the House of Lords Constitution Committee.[41]

THE RELEVANCE OF THE SOLE OR DECISIVE RULE TO COMMON LAW JURISDICTIONS

21. In *Horncastle*, Lord Phillips suggested that the sole or decisive rule had been introduced by the Strasbourg Court 'without full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions'.[42]

22. He speculated that one of the reasons for the guarantee in Article 6(3)(d) was that 'the continental procedure had not addressed that aspect of a fair trial that Article 6(3)(d) was designed to ensure'.[43] He noted, moreover, that the jurisprudence of the Strasbourg Court in relation to Article 6(3)(d) 'has developed largely in cases relating to civil law rather than common law jurisdictions and this is particularly true of the sole or decisive rule'.[44]

23. By contrast, Lord Phillips concluded, the rules of admissibility in England and Wales 'provide the defendant with at least equal protection to that provided under the continental system' (as modified, one assumes, by Article 6(3)(d)).[45] Hence the Supreme Court in *Horncastle* concluded that 'the regime enacted by Parliament [under the 2003 Act] contains safeguards that render the sole or decisive rule unnecessary'.[46]

24. Among other things, Lord Phillips noted the requirement under section 125(1) of the 2003 Act, requiring a judge to direct a defendant's acquittal in circumstances where the judge is satisfied:[47]

> *(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,*

25. The primary difference between this test and the sole or decisive rule under Article 6(3)(d) is essentially contained in section 125(1)(b), i.e. it refers to 'partly' rather than 'decisively' and introduces the additional requirement that the statement be 'so unconvincing' that any conviction would be 'unsafe'. Indeed, Lord Phillips contends that the approach taken by the Strasbourg Court in applying the sole or decisive rule:[48]

> *has been similar to that conducted by the English Court of Appeal when considering, notwithstanding the breach of a rule of admissibility, the conviction is 'safe'. There is, of course, an overlap between whether a procedure has been fair and whether a verdict is safe, and it is sometimes difficult to distinguish between the two questions.*

26. Lord Phillips goes as far to suggest that the overall safety of the conviction (i.e. the reliability of the evidence supporting it) is, or at least should be, the underlying basis of the sole or decisive rule:[49]

> *the Strasbourg Court has not … explained why a conviction based in part on the evidence of a witness who was not called, or who was anonymous, need not offend article 6(1) and (3)(d), while, on the contrary, if the evidence is sole or decisive the article will be violated. I have concluded, however, that the Strasbourg Court has drawn the distinction on the premise that a conviction based solely or decisively upon the evidence of a witness whose identity has not been disclosed, or who has not been subjected to cross-examination, or both, will not be safe.*

27. This leads Lord Phillips, and the Supreme Court in *Horncastle* as a whole, to the conclusion that the sole or decisive rule as applied by the Chamber in *Al Khawaja* and elsewhere is problematic because it permits no assessment of whether the hearsay in question is nonetheless 'safe', i.e. sufficiently reliable to justify the defendant's conviction. As Lord Phillips puts it:[50]

> *The sole or decisive test produces a paradox. It permits the court to have regard to evidence if the support that it gives to the prosecution case is peripheral, but not where it is decisive. The more cogent the evidence the less it can be relied upon. There will be many cases where the statement of the witness who cannot be called to testify will not be safe or satisfactory as the basis for a conviction. There will, however, be some cases where the evidence in question is demonstrably reliable.*

Similarly, the Court of Appeal in *Horncastle* held that 'sole or decisive hearsay evidence can be wholly convincing, indeed scarcely capable of dispute'.[51] Because the sole or decisive rule would bar such evidence as the basis of a person's conviction, the Supreme Court therefore suggests that the rule is 'draconian', and notes that 'Parliament has concluded that there are alternative ways of protecting against [the] risk' of being convicted solely or largely on the basis of unreliable evidence.[52] In particular, the Supreme Court criticises the Chamber judgment in *Al Khawaja* for doubting whether there were any 'counterbalancing' factors or measures sufficient to outweigh the potential unfairness of using hearsay.[53]

28. JUSTICE submits, however, that the Supreme Court in *Horncastle* placed too much faith in the possibility of 'counterbalancing measures' as a means to overcome the manifest unfairness of convicting a person wholly or largely on the basis of unchallenged testimony. The essence of the common law right of confrontation lies in the insight that cross-examination is the most effective way of establishing the reliability of a witness's evidence. As the American jurist Wigmore put it:[54]

> *For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test has found increasing strength in lengthening experience.*

No matter what other counter-balancing measures may be employed, JUSTICE submits they can be no substitute for the cross-examination of a witness in open court.[55]

29. As a hypothetical example of hearsay that may be considered 'demonstrably reliable', Lord Phillips gives the case of a witness to a deadly hit-and-run who provides a detailed statement appearing to identify the accused, but who is killed before he is able to give evidence.[56] In order for a judge to be satisfied that that testimony is sufficiently reliable to allow a jury to convict, however, the judge must inevitably ask what difference it would have made for the defendant to be able to cross-examine the witness. The warning of Megarry J in *John v Rees* [1970] Ch 345 at 402 in this context is particularly apt:[57]

> *As everybody who has anything to do with the law well knows, the path of the law is strewn about with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.*

Similarly, the observation of Lord Justice Sedley in *Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148 makes clear the dangers involved:[58]

> *Far from being difficult, as Lord Brown tentatively suggested it was, it is in my respectful view seductively easy to conclude that there can be no answer to a case of which you have only heard one side. There can be few practising lawyers who have not had the experience of resuming their seat in a state of hubristic satisfaction, having called a respectable witness to give apparently cast-iron evidence, only to see it reduced to wreckage by ten minutes of well-informed cross-examination or convincingly explained away by the other side's testimony. Some have appeared in cases in which everybody was sure of the defendant's guilt, only for fresh evidence to emerge which makes it clear that they were wrong. As Mark Twain said, the difference between reality and fiction is that fiction has to be credible. In a system which recruits its judges from practitioners, judges need to carry this kind of sobering experience to the bench. It reminds them that you cannot be sure of anything until all the evidence has been heard, and that even then you may be wrong. It may be, for these reasons, that the answer to Baroness Hale's question – what difference might disclosure have made? – is that you can never know.*

Just as a judge may conclude that it is unnecessary to disclose sensitive evidence to a defendant on the basis that he would be incapable of answering it, a judge may conclude that it is safe to convict the defendant on the basis of uncontradicted testimony because he is satisfied that there was nothing the accused person could say to challenge it. In both cases it will often be 'seductively easy' for the court to conclude that the operation of an essential safeguard would have made no difference to the outcome.

30. It is for this reason that the 'paradox' referred to by Lord Phillips is not a paradox at all. Hearsay does not become more 'cogent' simply because it may be the sole or substantive evidence of a person's guilt. It is true that – in a crude sense – the more 'decisive' hearsay testimony may seem, the more likely it is to be excluded, but this is justified by reference to the centuries-old fear of common law judges that juries may give it undue weight. JUSTICE respectfully submits, however, that juries are not the only tribunal of fact liable to such errors. Even experienced judges may fall prey to the perception that untested hearsay is more reliable than it actually is.

31. Indeed, if it were accepted, Lord Phillip's preferred interpretation of the sole or decisive rule would reduce the right to cross-examine witnesses under Article 6(3)(d) to the right merely to be convicted on the basis of evidence that seems to a judge to be sufficiently reliable, independent of whether it has been tested by cross-examination or not. This may perhaps be consistent with the previous practice of some continental legal systems, but it would turn centuries of common law principle on its head.

32. In fact, Lord Phillip's analysis seems to produce a curious paradox of its own: which is that the greater the weight of common law principle behind a Convention right, the less the UK ought to be bound by it. Such an analysis cannot be correct. Even if the Supreme Court in *Horncastle* is right that the main purpose of Article 6(3)(d) was to bring inquisitorial continental legal systems in line with common law adversarial ones, it does not follow from this that common law jurisdictions are able to escape being bound by the established principles of their own tradition, still less by reference to a recent change in their domestic rules of evidence (even one that is said to reflect a broad academic, professional and judicial consensus).

33. In truth, the hearsay provisions of the 2003 Act were not quite so uncontentious as the Supreme Court judgment in *Horncastle* suggests. There can be no doubt that the hearsay rule was in desperate need of reform, but the common law right of confrontation certainly was not. As Professor Friedman put it:[59]

> *lurking within the rule against hearsay and often shrouded by its many excesses and oddities is* a principle of magnificent importance, *a principle first enunciated long before the development of the common law system but one that achieved its full development within that system. This is the principle that a person may not offer testimony against a criminal defendant unless it is given under oath face to face with the accused and subject to cross examination.*

34. It would violate this ancient right of confrontation and – JUSTICE submits – the right of cross-examination under Article 6(3)(d) for a person to be convicted solely or to a decisive extent upon uncross-examined testimony, no matter how reliable it may appear.

THE PRACTICALITY OF OPERATING THE SOLE OR DECISIVE RULE IN ENGLAND AND WALES

35. In addition to raising various concerns of substance, the Supreme Court in *Horncastle* also criticised the sole or decisive rule on the grounds that 'create severe practical difficulties if applied to English criminal procedure'.[60] In particular, it complained that 'decisiveness' was an especially difficult concept to apply.

36. However, the 2003 Act already requires judges to consider the potential consequences of admitting hearsay statements as evidence: see e.g. sections 114(1)(d) and (2)(i); 116(4)(b); 121(c) and 126(1)(b). More generally, judges have ample experience of making similar assessments in the context of other exclusionary rules, and in the exercise of their general discretion to exclude evidence for unfairness under section 78(1) of the Police and Criminal Evidence Act 1984:

> *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.*

37. In addition, section 125(1) of the 2003 Act obliges a judge to direct an acquittal where the case against the accused is based 'wholly or partly' on unconvincing hearsay. As a matter of practicality, therefore, the 2003 Act allows a number of opportunities for the sole or decisive rule to be applied.

38. JUSTICE agrees that some clarification of the concept of decisiveness in this context would be welcome. Nonetheless, it does not share the Supreme Court's pessimistic assessment of its general

workability. For instance, the sole or decisive rule is already applied by judges in criminal proceedings when deciding whether to make a witness anonymity order (see section 89(2)(c) of the Coroners and Justice Act 2009, replacing section 5(2)(c) of the Criminal Evidence (Witness Anonymity) Act 2008). Following the judgment of *Secretary of State for the Home Department v AF and* others [2009] UKHL 28, it is also applied in control order proceedings under the Prevention of Terrorism Act 2005.

39. In JUSTICE's view, the concept of decisiveness will plainly depend upon the context of the proceedings, having regard to the overriding need to ensure a fair hearing. In the context of disclosure of closed material,[61] for instance, it submits that 'decisive' means 'capable of making a difference to the decision to be made'. In the context of determining the admissibility of hearsay, on the other hand, JUSTICE submits that a somewhat narrower conception of 'decisive' would be appropriate: e.g. not merely 'capable of making a difference', but instead 'likely to be determinative or conclusive'. As the Court of Appeal noted in *R v Mayer and others* [2008] EWCA Crim 2989, however, the court should not only have regard to the likely impact of each witness's individual testimony but also any cumulative effect.[62]

THE STATUS OF THE HEARSAY RULE IN OTHER COMMON LAW JURISDICTIONS

40. In *Horncastle*, the Supreme Court supported its conclusions about the sole or decisive rule by reference to the experience of other common law jurisdictions:[63]

> *Other common law jurisdictions, namely Canada, Australia and New Zealand have, by both common law and statutory development, recognised hearsay evidence as potentially admissible, under defined conditions …. This demonstrates that, under common law and statutory exceptions to the hearsay rule recognised in those jurisdictions, there is no rigid rule excluding evidence if it is or would be either the 'sole' or 'decisive' evidence, however those words may be understood or applied.*

41. However, as the Supreme Court itself noted, the United States – one of the largest common law jurisdictions – operates much more rigid exclusionary rule against hearsay, one that is explicitly justified by reference to the common law right of confrontation in the 17th century. Moreover, no mention was made in the *Horncastle* judgment of the position in any other common law jurisdiction, including those within the Council of Europe – most notably the Republic of Ireland.

42. JUSTICE submits that the Supreme Court's analysis of the comparative common law was, at best, a partial one. On the available evidence, it is simply not possible to say – as the Supreme Court claimed – that other common law jurisdictions would not also find a criminal conviction based solely or to a decisive extent on hearsay to breach their respective constitutional guarantees of a fair trial. By way of illustration, JUSTICE provides further analysis of the relevant law in Australia, Canada and New Zealand and sets out the relevant position in three other major common law jurisdictions: Hong Kong, Ireland and South Africa.

Australia

43. Australia is alone amongst major common law jurisdictions in having no formal constitutional or statutory guarantee of the right to a fair trial and, indeed, almost no constitutional protection for fundamental rights in general.[64] The right to a fair trial is, instead, at best an implied right. The Australian High Court has, from time to time, referred to the right to a fair trial under Article 14 ICCPR but this is not incorporated into domestic law.[65] JUSTICE submits that Australian law is, therefore, ultimately of limited assistance.

44. In any event, the provisions of the federal Evidence Act 1995 and the decision of the High Court of Australia in *Bannon*[66] cited by Lord Mance in *Horncastle* show only that hearsay evidence may be admissible in certain circumstances in criminal proceedings in Australia, including where it is 'highly probable that the representation is reliable'.[67] The decision in *Bannon* certainly does not establish that Australian courts would therefore conclude that a conviction based wholly or substantially on uncross-examined testimony would nonetheless be fair. As with other common law countries, the hearsay rule is closely linked in Australia with the common law right of confrontation:[68]

> *A more accurate description of the hearsay rule's effect is that it preserves the right of a party to insist on proof of witnessed events by sworn testimony.*

Canada

45. Section 7 of the Canadian Charter of Rights and Freedoms guarantees the right of 'life, liberty and security of the person', as well as the right 'not to be deprived thereof except in accordance with the principles of fundamental justice'.[69] In *R v Khelawon* [2006] 2 SCR 787 the Canadian Supreme Court considered the reliability requirement to the hearsay rule in factual circumstances very similar to that of Lord Phillip's hypothetical example in *Horncastle* - a witness who gave a videotaped statement to the police but then died before the case came to court. It held:[70]

> *There are no adequate substitutes here for testing the evidence. There is the police video — nothing more. The principled exception to the hearsay rule does not provide a vehicle for founding a conviction on the basis of a police statement, videotaped or otherwise, without more. In order to meet the reliability requirement in this case, the Crown could only rely on the inherent trustworthiness of the statement.*

Khelawon was not cited by the Supreme Court in *Horncastle*. Given the importance that the Canadian courts attach to the testing of testimony by way of cross-examination as a means of establishing reliability, it is not at all unlikely that they would conclude that a conviction founded solely or decisively on the basis of uncontested testimony to violate section 7 of the Charter.

Hong Kong

46. Article 39 of the Basic Law provides, among other things, that rights under the ICCPR remain in force. Hearsay continues to be excluded as a general rule under the common law, with the traditional common law exceptions supplemented by a limited number of statutory ones under the Evidence Ordinance.[71] There is no judicial discretion to admit otherwise inadmissible hearsay. In November 2009, the Hong Kong Law Reform Commission published its report on hearsay in criminal proceedings.[72] It proposes retaining the exclusionary rule, but with clarification of the existing exceptions and introducing an inclusionary discretion 'on the basis of a defined test of necessity and threshold reliability'. It also recommended:[73]

> *incorporating sufficient safeguards within the core scheme to protect the innocent from being convicted and to prevent the integrity of the trial process from being compromised;*

The Law Reform Commission referred at length to the Chamber judgment in *Al Khawaja* and stated that 'we are satisfied that our proposals would comply'.[74] The Law Reform Commission also considered and rejected the option of following the UK reforms introduced by the 2003 Act:[75]

> *its categories of automatic admissibility provide insufficient assurances of reliability and the terms of the residual discretion to admit hearsay are too open-ended and vague.*

Ireland

47. In addition to having incorporated the European Convention on Human Rights into its domestic law,[76] the Irish Supreme Court has held that Articles 38(1) and 40(3)(1) of the 1937 Irish Constitution gives rise to a right to fair procedures, including the right to confront and cross-examine witnesses.[77] Irish law maintains a general exclusion of hearsay, with a number of recognised exceptions.[78] In March 2010, the Irish Law Reform Commission published a report on hearsay, noting:[79]

> *the right to cross examine is one of the foundations for the hearsay rule and that the right of confrontation forms an important component of the criminal trial under the Irish Constitution and at common law.*

As in Hong Kong, the Irish Law Reform Commission notes the Chamber judgment in *Al Khawaja,*[80] observing that 'appears consistent with the case law of the Irish courts'.[81] The consultation paper also criticises the breadth of the UK reforms to the hearsay rule under the 2003 Act, on the grounds that it 'relaxes the rule in such a manner as to potentially render the rule against hearsay redundant'.[82] Like the Hong Kong Law Reform Commission report, the Irish Law Reform Commission rejects following the UK model, and provisionally recommends against the adoption of an inclusionary discretion based on reliability.[83]

New Zealand

48. Section 25(f) of the New Zealand Bill of Rights Act 1990 guarantees the right of defendants in criminal proceedings to 'examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution'. Surprisingly, the discussion of NZ law in Annex 1 of the Supreme Court's judgment in *Horncastle* makes no mention of this. It also fails to note that the hearsay rule was reviewed by the New Zealand Law Commission in 1999,[84] nor that it was extensively reformed by the Evidence Act 2006. Section 18(1) of the 2006 now makes hearsay generally admissible if the 'circumstances … provide reasonable assurance that the statement is reliable'. Under section 16, 'circumstances' includes those relating to 'veracity' and 'accuracy'. However, section 8(1) of the 2006 Act also requires the judge to exclude evidence where its probative value is outweighed by the risk that it will unfairly prejudice the outcome of proceedings. When determining the risk of prejudice, section 8(2) directs the judge to 'take into account the right of the defendant to offer an effective defence'. Moreover, section 6 of the NZ Bill of Rights Act requires courts to interpret all statutory provisions in a manner consistent with rights guaranteed under the Act.

South Africa

49. Section 35(3) of the South African Bill of Rights 1996 guarantees that 'every accused person has the right to a fair trial', including the right 'to adduce and challenge evidence'. The South African law on hearsay is set out in section 3 of the Law of Evidence Amendment Act 1988. This retains the general exclusionary rule but also introduces a broad discretion to admit hearsay 'in the interests of justice'.[85]

50. Despite this generous discretion, the South African courts have been reluctant to make use of hearsay due to concerns about its fairness. In the 1996 Supreme Court of Appeal decision of *S v Ramavhale* (208/95) [1996] ZASCA 14, for instance, Justice Schutz held that:[86]

> *a court should hesitate long before admitting or relying on hearsay that plays* a decisive or even a significant part in convicting an accused *unless there be a compelling justification for doing so.*

Justice Schutz's warning was echoed by the Supreme Court of Appeal in *S v Ndhlovu and others* (327/01) [2002] ZASCA 70:[87]

> *Aside from the importance of* [Justice Schutz's] cautionary words, *a trial court must in applying the hearsay provisions of the 1988 Act be scrupulous to ensure respect for the accused fundamental right to a fair trial.*

CONCLUSION

51. The sole or decisive rule under Article 6(3)(d) recognises the simple truth that a person convicted solely or to a decisive extent on the basis of uncross-examined testimony will not have received a fair trial, no matter how plausible that testimony may appear to the judge at trial.

52. It is important to note that Article 6(3)(d) does not bar the use of hearsay as evidence in general. Instead, it recognises that the nature of hearsay makes it inherently unsound as the sole or substantial basis for a person's conviction. Perceived reliability can be no substitute for actual fairness.

53. As JUSTICE has endeavoured to show, the sole or decisive rule is entirely consistent with centuries old common law principle. The importance of Article 6(3)(d) is not limited to those continental systems without a strong history of confrontation. It also lies in reminding the national institutions of common law jurisdictions of the strength and importance of their own legal traditions.

4 April 2010

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[1] Pursuant to Art. 36(2) and Rule 44(2).

[2] Para 14(6) per Lord Phillips.

[3] Para 14(8).

[4] See e.g. Birch, 'Criminal Justice Act 2003: hearsay – same old story, same old song?' (2004) Crim LR 556 at 573: 'it is a fair bet that law students will continue to groan whenever the word " hearsay" is mentioned'; and Worthen, 'The Hearsay Provisions of the Criminal Justice Act 2003: So Far, Not So Good?' (2008) Crim LR 431 at 431: 'the overall effect of the Act falls well short of removing the problems from this area of law; indeed, in several respects, the 2003 Act may make the position worse'; Wilcock and Bennathan, 'The new rules of hearsay evidence', (2004) 154 New Law Journal 1174 at 1174: 'Those who simply hoped for the rule to be abolished with juries and judges left to consider reliability and weight will be disappointed, as the various routes to admissibility are full of detailed provisions'.

[5] Acts, 25: 16. Emphasis added.

[6] *R v Davis*[2008] UKHL 36 at para 5:'in continental Europe the principle was greatly attenuated in early mediaeval times and the procedure of the Inquisition, directed to the extirpation of heresy and the preservation of society, depended heavily on evidence given secretly by anonymous witnesses whom the suspect was denied the opportunity to confront. In England, where proof of crime depended on calling live evidence before a jury to convince it of a defendant's guilt, there was no room for such procedures'. See also e.g. Blackstone, *Commentaries on the Laws of England* vol 3, 373–374 (1768).

[7] Jardine, 1 Criminal Trials 389-520 at 427. Emphasis added. See also e.g. Shakespeare, *Richard II*, in which Richard – invited to determine charges of treason - declares that: 'face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak' (Act I: i: 15-17).

[8] See e.g. Cross and Tapper (10th ed) at 590: although doubts about the reliability of hearsay as evidence were the more common justification for the exclusionary rule, 'it is possible to explain many of the results of the hearsay rule by reference to the somewhat different confrontation principle: namely, that a party, and especially the accused, was entitled to confront his opponents as an essential element of a fair trial'.

[9] *R v Eriswell (Inhabitants)* 1790 3 TR 70.

[10] *The Works of Jeremy Bentham*, vol 7 (Edinburgh, 1843), p 500. See also e.g. *Teper v R* [1952] AC 480 at 486 per Lord Normand: '[Hearsay] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost'.

[11] *Treatise of Judicial Evidence* (London, 1825), p 230. The only circumstances in which Bentham thought hearsay ought to be admitted was where 'no physical or moral evidence exists, and we are reduced to the necessity of receiving this testimony, inferior as it is, because the source from which it has been drawn no longer exists'; where the witness was unable to be examined because of 'sickness or distance'; or introduced to support or invalidate the testimony of a witness given in open court (in the manner of a previous consistent or inconsistent statement).

[12] Bentham, *Works*, n10 above, vol 7, p 57. Emphasis added. Bentham was here discussing the use of hearsay as character evidence.

[13] Murphy, *Murphy on Evidence* (10th ed, Oxford University Press) at p 207, emphasis added. In the context of jury trial, judges were particularly concerned to exclude hearsay out of fear that juries would attach improper weight to it: see e.g. *R v Sharp* [1988] 1 WLR 7 at 11 per Lord Havers: 'I suspect that the principle reason that led judges to adopt it many years ago was the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it was passed from one person to another'; *R v Blastland* [1986] AC 41 at 54 per Lord Bridge: 'Hearsay is not excluded because it has no logical probative value …. The rationale of excluding it as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross examination ….The danger against which this fundamental rule provides a safeguard is that untested hearsay will be treated as having a probative force which it does not deserve'.

[14] Murphy, ibid, at p 208.

[15] *Cases and Materials on the English Legal System* (10th ed, Cambridge, 2007), at p 446, emphasis added.

[16]Article 8 of the Virginia Constitution, 12 June 1776, emphasis added. See also e.g. Article 9 of the Constitution of Pennsylvania, 28 September 1776; Article 7, Constitution of North Carolina, 18 December 1776; and Article 10 of the Constitution of Vermont, 8 July 1777, all of which follow the language of the Virginia constitution.

[17]See e.g. *Mattox v United States* 156 US 237 (1895) at 242-243: the Sixth Amendment requires 'a personal examination an cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief'. See also e.g. *Pointer v Texas* 380 US 400 at 404 per Black J: 'The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution'; *Lee v Illinois* 476 US 530 (1986) at 540 per Brennan J: the right of confrontation 'contributes to the establishment of a system of justice in which the perception, as well as the reality, of fairness prevails'; *Coy v Iowa* 487 US 1012 (1988) at 1019 per Scalia J: 'the perception that confrontation is essential to fairness has persisted over centuries because there is much truth to it'.

[18] Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 5, para 1364 (3rd ed, 1940).

[19] US Supreme Court in *Crawford v Washington* 541 US 36 (2004) at 68-69 per Scalia J. As the UK Supreme Court noted in *Horncastle* at para 44, 'the majority in the Supreme Court … took an 'originalist' approach to the Constitution, relying on its view of the common law position in the late 17th century'. The UK Supreme Court did not say, however, whether it thought the US Supreme Court's analysis of the common law in *Crawford* was inaccurate.

[20] See e.g. the remarks of Judge J (as he was then) in *R v Central Criminal Court ex parte Bright and others* [2000] EWHC 560 (QB) at para 87: 'the principles to be found in Articles 6 and 10 of the European Convention are bred in the bone of the common law and indeed, in some instances at any rate, the folk understanding of the community as a whole'; *R v Camberwell Green Youth Court* [2005] UKHL 4 at para 10 per Lord Rodger: 'the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused'; *R v Davis*, n6 above, at para 24 per Lord Bingham: 'It may well be … that the inclusion of article 6(3)(d), guaranteeing to the defendant a right to examine or have examined witnesses against him, reflected the influence of British negotiators'.

[21] In *Myers v DPP* [1965] AC 1001, for instance, Lord Reid complained that it was 'difficult to make any general statement about the law of hearsay evidence which is entirely accurate' (1019 G to 1020 A). In *Jones v Metcalfe* [1967] 1 WLR 1286, Lord Diplock referred to the law on hearsay as 'a branch of the law which has little to do with common sense'. See also e.g. the conclusion of Lord Justice Auld of the hearsay rule as 'complicated, unprincipled and arbitrary' (*Review of the Criminal Courts of England and Wales* (2001) at p 557).

[22] JUSTICE, *Miscarriages of Justice* (1989) para 3.41.

[23] *Evidence in Criminal Proceedings: Hearsay and related topics* (LC 245: April 1997), para 4.13.

[24] Michael Wills MP, Hansard, HC Standing Committee debate on the Criminal Justice Bill, 28 January 2003, col 608; Lord Davies of Oldham, HL debate at Second Reading on the Criminal Justice Bill, 18 September 2003, col 1116.

[25] Law Commission report on hearsay, n23 above, para 4.61.

[26] Ibid, para 8.136.

[27] Ibid, para 8.133. See also e.g. Birch, n4 above, at 558 referring to the inclusionary discretion: 'Only in exceptional circumstances … should the normal rules be overridden'.

[28] *Horncastle*, para 29.

[29] Ibid, para 40.

[30] See *R v Horncastle and others* [2009] EWCA Crim 964 at para 10 per Thomas LJ.

[31] Ibid.

[32] *Horncastle*, para 107.

[33] Birch, n4 above at 558. The Commission's proposals were not universally welcomed, however, with some complaining that they did not go far enough: see e.g. Spencer, 'Hearsay Reform: A Bridge not Far Enough?' [1996] Crim.L.R. 29; Jackson, 'Hearsay: the Sacred Cow that won't be slaughtered' (1998) 2 E & P 166 at 187.

[34] JUSTICE briefing on Part 11, Chapter 2 of the Criminal Justice Bill at Committee stage in the House of Commons, January 2003, para 11. See also amendments proposed to the Criminal Justice Bill by the Legal Action Group at Committee stage in the House of Commons: 'the provisions on hearsay in Chapter 2, Part 11 of the Criminal Justice Bill allow such wide exceptions that the general exclusionary rule [recommended by the Law Commission] is more or less redundant. Far from simplifying the law, these clauses are highly complex, are likely to lead to uncertainty for those involved in trial preparation, and will lead to lengthy legal arguments as to whether evidence should be admitted in a particular case. We are particularly concerned that these provisions would have the effect of removing the all-important 'interests of justice' test for admitting certain classes of hearsay evidence, contrary to the Law Commission's recommendations'.

[35] See n24 above.

[36] See e.g. Lord Thomas of Gresford QC who argued that the 'interests of justice' test contained in clause 114 was 'extremely vague and broad and introduce into the law of evidence in criminal cases hearsay evidence wholesale. (Hansard, HL debates, 18 Sept 2003, col 1109). Even peers who were supportive noted that the interests of justice test had been altered from the Law Commission proposals: see e.g. Lord Cooke of Thorndon, the former President of the NZ Court of Appeal: 'The genesis of that provision [114(1)(d)] is in a clause rather tucked away in the Law Commission's draft and somewhat less strongly worded by the commission …. The commission suggested that the power would be used only exceptionally. However, neither in its draft nor in the Bill before the House is there that limitation' (HL debates, 18 September 2003, col 1111). As one former Lord of Appeal in Ordinary noted, 'one must not be hypnotised by the fact that the Law Commission has gone one way' (Lord Ackner, 18 September 2003, col 1118). Government ministers themselves conceded that they did not follow the Law Commission proposals: I was asked why we have crafted the Bill slightly differently from the way proposed by the Law Commission. [The proposed interests of justice test] draws substantially on the work of the Law Commission … but it does not follow it slavishly. [Baroness Scotland of Asthal, HL debates, 18 September 2003, col 1123].

[37] See the speech of Home Office minister Baroness Scotland of Asthal, HL debates, 19 November 2003, col 2005. See also Birch, n4 above, at 559: 'in the House of Lords what is now s.114 fell victim to an unholy alliance between those who would have preferred a more liberal regime and those who thought the safety valve should be removed, being too vague and over-reliant on judicial discretion. For a while the Bill tottered along without its key definitional section, although the Government managed to reinstate it, on Third Reading, modified so as to permit the use of the safety valve only where it is positively 'in the interests of justice' to do so'.

[38] See Cross and Tapper, n8 above, at 656: 'The Law Commission envisaged [the discretion in s 114(1)(d)] as a very limited exception. It is, however, hard to see that this will necessarily be the case, since, in terms, the discretion is completely open-ended, and no sanctions for its misuse are explicitly provided'; *Blackstone on Criminal Procedure 2010* (para F16.20, p2567), the 'interests of justice' test in s 114(1)(d) of the CJA 2003 was: 'originally conceived by the Law Commission as a 'safety valve' for the admission of otherwise inadmissible evidence in exceptional circumstances only, there is nothing in the statutory language to indicate that this is how s 114(1)(d) is to be used…'; Worthen, n above, at 437:Parliament, though, did not entirely follow the Law Commission's treatment of this discretionary power. Instead, it chose to elevate the provision to the status of one of the four principal gateways in s.114, thus seeming to indicate that it envisaged the power having a somewhat broader role. Moreover … the Minister putting forward the Criminal Justice Bill made clear in Parliament that it was intended to be available for both prosecution and defence--s.114(1)(d) was not to be restricted simply to avoiding wrongful convictions'. See

e.g. *Murphy on Evidence*, n13 above, at 219: the English courts have so far held that the English law of evidence conforms with the right to a fair trial guaranteed by art 6 of the Convention. Of all the hearsay provisions of the Criminal Justice Act 2003, only s 114(1)(d), which gives the trial judge a broad power to admit hearsay evidence when it is the interests of justice for it to be admitted … seems to have any potential to cause this position to change. It is submitted that there is a serious question as to whether the fairness of the trial is harmed by giving the judge such a wide and largely unbridled power to admit hearsay evidence, and thereby deprive the accused of the right to cross-examine the witnesses against him'.

[39] *Horncastle*, para 55.

[40] Ibid, para 92. See also e.g. the speech of Lord Brown at para 113, referring to the sole or decisive rule as 'inflexible' and 'unqualified'. The provisions of the 2008 Act have now been reenacted in Chapter 2 of Part 3 of the Coroners and Justice Act 2009.

[41] See e.g. House of Lords Constitution Committee, *Criminal Evidence (Witness Anonymity) Bill* (HL 147: July 2008) at para 19; *Fast-track Legislation: Constitutional Implications and Safeguards* (HL 116: July 2009) at paras 89-92.

[42] *Horncastle,* para 14(6).

[43] Ibid, para 14(3) and paras 57-62.

[44] Ibid*,* para 107. At para 57, Lord Phillips similarly cites the speech of Lord Rodger in *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 at para 11: 'An examination of the case law of the European Court of Human Rights tends to confirm that much of the impact of article 6(3)(d) has been on the procedures of Continental systems which previously allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge'.

[45] Ibid, para 93.

[46] Ibid, para 14(2).

[47] See *Horncastle*, ibid, para 36(ii).

[48] Ibid, para 69.

[49] Ibid, para 86.

[50] Ibid*,* para 91.

[51] *R v Horncastle and others,* n30 above, at para 74.

[52] *Horncastle*, para 92.

[53] Ibid, paras 106-107.

[54] *Wigmore on Evidence*, n18 above, vol 5, at para 1367.

[55] Neither should legitimate concerns over witness intimidation be allowed to override the requirements of basic fairness. Such intimidation is a very serious issue but one that is properly addressed by way of providing effective witness protection measures, rather than by abridging basic principles of procedural fairness.

[56] *Horncastle*, para 91.

[57] In *John v Rees*, the court was concerned with a breach of natural justice, a deliberate decision by a local Labour party group not to give notice to all of its members, which the court ultimately held had the effect of invalidating its proceedings.

[58] Para 113. The Court of Appeal decision in *AF* was noted by the Grand Chamber in its judgment in *A and others v United Kingdom* (2009) 49 EHRR 29 at para 97.

[59] RD Friedman, 'Thoughts from across the water on hearsay and confrontation', (1998) Crim LR at 697, emphasis added.

[60] *Horncastle,* para 14(8).

[61] See e.g. the judgment of the Grand Chamber in *A and others v United Kingdom,* n58 above, para 220 et seq.

[62] See paras 25 and 82 per Judge LJ.

[63] *Horncastle*, para 41. See also para 46, where Lord Phillips also referred to the 'startling' proposition that: 'by propounding the sole or decisive test the Strasbourg Court has condemned as rendering unfair the admission of hearsay evidence in circumstances where the legislature and courts of … other important common law jurisdictions (Canada, Australia and New Zealand) have determined that the evidence can be fairly received'.

[64] The only rights expressly guaranteed by the Commonwealth of Australia Constitution Act 1900 are trial by jury for indictable offences (section 80), freedom of religion (section 116), and non-discrimination on the grounds of out-of-state residency (section 117). Indeed, only the latter is referred to as a 'right'.

[65] See e.g. *Dietrich v The Queen* [1992] HCA 57.

[66] *Bannon v The Queen* (1995) 185 CLR 1.

[67] Section 65(2)(c) of the Evidence Act 1995 (Cwtlh).

[68] Gans and Palmer, *Australian Principles of Evidence,* 2nd ed (Cavendish, 2004) at 156.

[69] Part I of the Constitution Act 1982.

[70] Para 106. *Khelawon* was not cited by the Supreme Court in *Horncastle*.

[71] Law Reform Commission of Hong Kong*, Report: Hearsay in Criminal Proceedings* (November 2009), para 8.1.

[72] Ibid.

[73] Ibid, para 8.4(e).

[74] Ibid, paras 9.74- 9.76.

[75] Ibid, recommendation 7 on page 103.

[76] See the European Convention on Human Rights Act 2003, incorporating the Convention in Irish law.

[77] See e.g. *Re Haughey* [1971] IR 217. See also e.g. *The State (Healy) v Donoghue* [1976] IR 325; *Donnelly v Ireland* [1998] 1 IR 321.

[78] See e.g. *Cullen v Clarke* [1963] IR 368 at 378 per Kingsmill-Moore J 'it is necessary to emphasise that there is *no* general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There *is* a general rule, subject to many exceptions, that evidence of the speaking of such words is inadmissible to

prove the truth of the facts which they assert; the reasons being that the truth of the words cannot be tested by cross-examination and has not the sanctity of an oath'.

[79] Law Reform Commission, *Hearsay in Civil and Criminal Cases* (LRC CP 60, March 2010), para 1.25.

[80] Ibid, paras 2.105-2.115. The Supreme Court's judgment in *Horncastle* is also discussed alongside the Chamber judgment in *Al Khawaja*.

[81] Ibid, para 2.115.

[82] Ibid, para 5.32.

[83] Ibid, paras 5.47 and 5.49.

[84] New Zealand Law Commission, *Evidence,* Vols 1 and 2 (August 1999).

[85] See section 3(1)(c).

[86] Para 34, emphasis added.

[87] Para 7 per Cameron J.