International Association of Procedural Law
XIV World Congress – Heidelberg (Germany) 25-30 July 2011

Prohibited Methods of Obtaining and Presenting Evidence

Report for England and Wales

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Introductory Remarks

A feature of the discussions that follow is the importance of the role played by the Human Rights Act 1998 in the contemporary domestic law of England and Wales. This Act, which came fully into force on 2 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. In very brief terms, the purport of the Human Rights Act is as follows. Despite preserving the principle of Parliamentary sovereignty as far as primary legislation is concerned,[1] the Act provides that, in so far as it is possible to do so, all legislation must be read and given effect in a way that is compatible with the Convention rights.[2] If, however, primary legislation cannot be read in a way that renders it compatible with the Convention rights, the court must still apply it, but will be able, if it is a superior court, to issue a declaration of incompatibility.[3] Furthermore, public authorities, including courts and tribunals,[4] are obliged to act in a way which is compatible with the Convention rights[5] unless provisions in primary legislation require them to act differently.[6] 'A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any … judgment [or] decision … of the European Court of Human Rights … whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.'[7]

Obtaining Evidence

1. Describe briefly the legal rules in your country that restrain persons from obtaining evidence in breach of fundamental rights, such as physical and moral integrity, privacy

The trend towards detailed regulation of police powers in England and Wales has been evident for the past few decades. The Police and Criminal Evidence Act 1984 contains many rules relating to police powers, and the number of Codes of Practice accompanying the Act has grown to eight. Code A deals with the powers to search a person or vehicle where an arrest has not been

[1] S 3(2)(b).
[2] S 3(1).
[3] S 4(2). The superior courts include the House of Lords (or, from October 2009, the Supreme Court), the High Court and the Court of Appeal. See s 4(5).
[4] S 6(3)(a).
[5] S (1).
[6] S 6(2).
[7] S 2(1)(a).

made. Code B deals with the powers to search premises and to seize and retain property found on premises and persons. Code C concerns the detention, treatment and questioning of non-terrorism suspects in police custody. Code D makes provision in relation to different methods of generating identification evidence. Code E deals with the tape recording of interviews with suspects in police stations. Code F deals with the visual recording of interviews, and is relevant where a visual recording is made of an interview even though there is currently no obligation to do so. Code G deals with powers of arrest, and Code H concerns the detention, treatment and questioning of terrorism suspects in police custody.

The European Convention on Human Rights is also significant. For example, Article 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Article 8, which essentially guarantees the right to privacy, provides as follows:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 6(1) guarantees the right to a fair trial.

2. What are the legal/procedural consequences of such breaches?

There are, in essence, three automatic exclusionary rules. First, a confession made by an accused person that was obtained by oppression, or by words or actions conducive to unreliability, is automatically inadmissible in evidence at the behest of the prosecution. Secondly, any evidence obtained by torture is automatically inadmissible. Thirdly, the Regulation of Investigatory Powers Act 2000 has been held to prohibit impliedly the admission in evidence of any intercepted communications to which the Act applies, including communications intercepted illegally.

Any illegally obtained evidence not falling in one of the above three categories is presumptively admissible, but may be excluded in the exercise of the judicial discretion to exclude prosecution evidence to ensure a 'fair trial'. This 'fair trial' discretion has long been recognised at common law,[8] and is also encapsulated in section 78(1) of the Police and Criminal Evidence Act 1984, 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.

The first and second of the three automatic exclusionary rules outlined above will now be discussed.

[8] *R v Sang* [1980] AC 402.

2.1 Confession evidence

Section 76(2) of the Police and Criminal Evidence Act 1984 provides that there are two grounds on which a confession sought to be used at trial by the prosecution must be excluded from evidence:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

The word 'oppression' in **section 76(2)(a)** is defined in section 76(8) as *including* 'torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)'. The decisions of the Court of Appeal on confession evidence in which the meaning of 'oppression' has been considered suggest, however, that it connotes fairly harsh treatment of the confessor, and therefore that it is only in rare cases that the prosecution would be unable to prove that a confession was *not* obtained by oppression. In the leading case of *R v Fulling*, the Court of Appeal held that

> 'oppression' in section 76(2)(*a*) should be given its ordinary dictionary meaning. The *Oxford English Dictionary* as its third definition of the word runs as follows: 'Exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc; the imposition of unreasonable or unjust burdens.' One of the quotations given under that paragraph runs as follows: 'There is not a word in our language which expresses more detestable wickedness than oppression.'[9]

Thus the Court of Appeal found no oppression in *R v Emmerson* where one of the interviewing officers, giving the impression of impatience and irritation, 'raised his voice and used some bad language'.[10] By contrast, in *R v Paris*, one of the co-accused, Miller, was

> bullied and hectored. The officers, particularly Detective Constable Greenwood, were not questioning him so much as shouting at him what they wanted him to say. Short of physical violence, it is hard to conceive of a more hostile and intimidating

[9] [1987] QB 426, 432.
[10] (1991) 92 Cr App R 284, 287 (decision of 1990). See also *R v Foster* [2003] EWCA Crim 178.

> approach by officers to a suspect. It is impossible to convey on the printed page the pace, force and menace of the officer's delivery … [11]

The Court of Appeal held that this conduct clearly amounted to oppression.

In essence, **section 76(2)(b)** is directed at the issue of potentially unreliable confession evidence. It requires the court to determine whether the confession was obtained *in consequence of* something *said or done* which, taking into account *all the circumstances* prevailing at the time, was *likely* to cause *any confession* which might be made to be *unreliable*.

2.2 Evidence obtained by torture

In *A v Secretary of State for the Home Department*,[12] the House of Lords considered the issue of evidence obtained by torture. While the case concerned evidence of statements, which carry obvious dangers of unreliability, the Law Lords clearly assumed that their ruling would cover *any* evidence. The House of Lords held that there is a rule of law that evidence obtained by torture is automatically inadmissible in proceedings in the United Kingdom, regardless of where, by whom and against whom the torture was committed. Lord Hoffmann noted that

> the law has moved on. English law has developed a principle … that the courts will not shut their eyes to the way the accused was brought before the court *or the evidence of his guilt was obtained*. Those methods may be such that it would compromise the integrity of the judicial process, dishonour the administration of justice, if the proceedings were to be entertained *or the evidence admitted*. In such a case the proceedings may be stayed *or the evidence rejected* on the ground that there would otherwise be an abuse of the processes of the court.[13]

In the words of Lord Carswell, 'the duty not to countenance the use of torture by admission of evidence so obtained in judicial proceedings must be regarded as paramount and … to allow its admission would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement'.[14]

The House of Lords made it clear in *A* that the exclusionary rule in question covered evidence obtained by torture only, and did not extend to evidence obtained by inhuman or degrading treatment. Such evidence was considered in *Jalloh v Germany*.[15] As a result of the forced administration of emetics, the defendant regurgitated a bag of cocaine that he had swallowed. The Grand Chamber of the European Court of Human Rights held that the evidence had been obtained as a result of 'inhuman and degrading treatment' and therefore in breach of Article 3.[16] The Court did not consider that the evidence had been obtained by torture under Article 3; if it had been, it would have had to be automatically excluded,[17] an approach

[11] (1993) 97 Cr App R 99, 103 (decision of 1992).
[12] [2005] UKHL 71, [2006] 2 AC 221.
[13] Ibid, [87] (italics added).
[14] Ibid, [150].
[15] (2007) 44 EHRR 32 (p 667) (judgment of 2006).
[16] Ibid, [82].
[17] Ibid, [105]: 'incriminating evidence—whether in the form of a confession or real evidence—obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture—should never be relied on as proof of the victim's guilt, irrespective of its probative value'.

consistent with that of English law. The Court considered that the question whether evidence obtained as a result of inhuman and degrading treatment, but not torture, was also subject to an automatic exclusionary rule could be left open.[18] The Court concluded on the facts of the case, however, that the admission of the evidence did violate the defendant's right to a fair trial under Article 6:

> The Court notes that, even if it was not the intention of the authorities to inflict pain and suffering on the applicant, the evidence was obtained by a measure which breached one of the core rights guaranteed by the Convention. Furthermore, it was common ground between the parties that the drugs obtained by the impugned measure were the decisive element in securing the applicant's conviction. It is true that, as was equally uncontested, the applicant was given the opportunity, which he took, of challenging the use of the drugs obtained by the impugned measure. However, any discretion on the part of the national courts to exclude that evidence could not come into play as they considered the administration of emetics to be authorised by the domestic law. Moreover, the public interest in securing the applicant's conviction cannot be considered to have been of such weight as to warrant allowing that evidence to be used at the trial. … the measure targeted a street dealer selling drugs on a relatively small scale who was finally given a six months' suspended prison sentence and probation.[19]

2.3 Evidence obtained in violation of Article 8

2.3.1 The jurisprudence of the European Court of Human Rights

A useful starting point is the May 2000 judgment of the European Court of Human Rights in *Khan v UK*.[20] Having failed in both the Court of Appeal[21] and House of Lords,[22] Khan took his case to Strasbourg. The essential facts were that on being interviewed at a police station after his arrival from Pakistan, Khan denied any offence and declined to answer most of the questions put to him. He was released without charge. Some months later he visited the home of a person whom the police suspected of involvement in the supply of heroin on a large scale. As a result of these suspicions they had installed an aural surveillance device on the exterior of the property, without the knowledge or consent of the owner or occupier of the property. An audio recording was obtained of a conversation which took place between Khan and others in which Khan made statements plainly demonstrating his involvement in the importation of heroin. The European Court of Human Rights observed: 'There was … no domestic law regulating the use of covert listening devices at the relevant time. … It follows that the interference in the present case cannot be considered to be "in accordance with the law", as required by Article 8(2) of the

[18] Ibid, [107].
[19] Ibid.
[20] (2001) 31 EHRR 45 (p 1016) (judgment of 2000).
[21] [1995] QB 27.
[22] [1997] AC 558.

Convention. Accordingly, there has been a violation of Article 8.'[23] On the issue of exclusion the Court commented as follows:

> With specfic reference to the admission of the contested tape recording, the Court notes that … the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the '*voire dire*' and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to section 78 of PACE …[24]
>
> The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under section 78 of PACE.[25]
>
> In these circumstances, the Courtfinds that the use at the applicant's trial of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6(1) of the Convention.[26]

The fact that the evidence 'was in effect the only evidence against the applicant' was considered irrelevant in the circumstances of the case:

> The relevance of the existence of evidence other than the contested matter depends on the circumstances of the case. In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker.[27]

Two themes emerge clearly from this judgment: first, that the reliability of the evidence is treated as a paramount consideration; and, secondly, that compliance with the right to a fair trial guaranteed by Article 6 of the European Convention will be considered to be secured by the appropriate use of section 78(1) of the Police and Criminal Evidence Act 1984. The later judgment of the European Court in *Allan v UK*[28] brings into sharp focus the respective approaches of the Court to different types of evidence obtained in violation of Article 8. When Allan was in custody with one Leroy Grant on suspicion of having committed a robbery, the police received information that Allan had been involved in a murder. Authority was accordingly granted by the Chief Constable for the cell and visiting areas used by Allan and Grant to be fitted with audio and video equipment. When Allan was subsequently arrested for the murder he exercised his right to remain silent. However, recordings were made of Allan's conversations (1) with a friend, JNS, in the prison visiting area, (2) with Grant in the cell in which they were held, and (3) with H, a police informant who was placed in Allan's cell for the purpose of eliciting information from him. He argued, inter alia, that the use of the evidence of these recordings (which, together with the testimony of H, constituted the principal evidence against him) violated Article 6(1).

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[23] (2001) 31 EHRR 45 (p 1016), [27]-[28] (judgment of 2000). See also *Elahi v UK* (2007) 44 EHRR 30 (p 645) (judgment of 2006). Note that there is now legal regulation of covert surveillance in the Regulation of Investigatory Powers Act 2000.

[24] (2001) 31 EHRR 45 (p 1016), [38].

[25] Ibid, [39].

[26] Ibid, [40].

[27] Ibid, [37]. See also *PG v UK*, Application no 44787/98, 25 Sept 2001; *Bykov v Russia*, Application no 4378/02, 10 March 2009; *Lee Davies v Belgium*, Application no 18704/05, 28 July 2009.

[28] (2002) 36 EHRR 12 (p 143) (judgment of 2002).

The European Court was 'not persuaded that the use of the taped material concerning Leroy Grant and JNS at the applicant's trial conflicted with the requirements of fairness guaranteed by Art 6(1) of the Convention':

> … the applicant's counsel challenged the admissibility of the recordings in a *voire dire*, and was able to put forward arguments to exclude the evidence as unreliable, unfair or obtained in an oppressive manner. The judge in a careful ruling however admitted the evidence, finding that it was of probative value and had not been shown to be so unreliable that it could not be left to the jury to decide for themselves. This decision was reviewed on appeal by the Court of Appeal which found that the judge had taken into account all the relevant factors and that his ruling could not be faulted. At each step of the procedure, the applicant had therefore been given an opportunity to challenge the reliability and significance of the recording evidence.[29]

In relation to the conversations with H, however, there had been a violation of Article 6(1):

> In contrast to the position in the *Khan* case, the admissions allegedly made by the applicant to H, and which formed the main or decisive evidence against him at trial, were not spontaneous and unprompted statements volunteered by the applicant, but were induced by the persistent questioning of H, who, at the instance of the police, channelled their conversations into discussions of the murder in circumstances which can be regarded as the functional equivalent of interrogation, without any of the safeguards which would attach to a formal police interview, including the attendance of a solicitor and the issuing of the usual caution. While it is true that there was no special relationship between the applicant and H and that no factors of direct coercion have been identified, the Court considers that the applicant would have been subject to psychological pressures which impinged on the 'voluntariness' of the disclosures allegedly made by the applicant to H: he was a suspect in a murder case, in detention and under direct pressure from the police in interrogations about the murder, and would have been susceptible to persuasion to take H, with whom he shared a cell for some weeks, into his confidence.[30]

It is no surprise, in the light of the stance taken earlier by the Court in *Khan*, that the admission of evidence of undisputed reliability was considered not to violate Article 6, while Article 6 was held to have been violated by the admission of evidence of questionable reliability.

2.3.2 The domestic jurisprudence

A few illustrations from English case law of the courts' approach to the exclusion of illegally obtained evidence in the light of Articles 8 and 6 may now be provided. In *R v Sanghera* the search of the defendant's premises had been conducted in breach of what was then paragraph 1.3 (now 2.3) of Code of Practice B in that his consent to the search had not been obtained. The Court of Appeal held that appropriate consideration of section 78(1) was sufficient to ensure compliance with the Convention. The Court was of the view, however, that the trial judge had exercised his discretion appropriately in not excluding the evidence:

[29] Ibid, [48].
[30] Ibid, [52].

> It is important to note that … the appellant did not challenge the fact of the discovery of the money. … There was no issue as to the reliability of the evidence. … In addition, there is the fact that there is no suggestion that the police were acting other than bona fide. … The money was in the box above the safe. … If the judge had acceded to the submissions that were made to him, the result of the failure to obtain formal written consent … would have had the consequence of interfering with the achievement of justice.[31]

Once again, the commitment to accurate fact-finding is immediately apparent.

In *R v Loveridge*, the Court of Appeal held the secret filming by police of defendants in the cell area of a magistrates' court to be in contravention of section 41 of the Criminal Justice Act 1925 and a breach of Article 8.

> However, so far as the outcome of this appeal is concerned, the breach of Article 8 is only relevant if it interferes with the right of the applicants to a fair hearing. Giving full weight to the breach of the Convention, we are satisfied that the contravention of Article 8 did not interfere with the fairness of the hearing. The judge was entitled to rule as he did. The position is the same so far as section 78 of the Police and Criminal Evidence Act 1984 is concerned. We would here refer to the judgment of Swinton Thomas LJ in the case of *Perry* … [32]

The remarks of Swinton Thomas LJ in *R v Perry*,[33] a decision on video identification evidence obtained in consequence of breaches of Code of Practice D, probably represent the high-water mark of judicial antagonism to the idea that the law on the exclusion of illegally obtained evidence may be altered by the Human Rights Act 1998:

> The purpose underlying the [Human Rights] Act is to protect citizens from a true abuse of human rights. If, as it seems to us has happened in this case, it is utilised by lawyers to jump on a bandwagon and to attempt to suggest that there has been a breach of the Act or of the Convention when either it is quite plain that there has not or alternatively the matter is amply covered by domestic law, then not only will the lawyers, but the Act itself (which is capable of doing a great deal of good to the citizens of this country) will be brought into disrepute. … In our judgment questions of breaches of the European Convention on Human Rights or the Act should not have formed any part of this appeal. All the submissions which have been made can properly and readily be dealt with under the provisions of our national law. It is devoutly to be hoped that the court's time will not be utilised in the future in this way.[34]

In *R v Button* the Court of Appeal observed: 'The intrusion or interference has already occurred, the evidence obtained is admissible under English law and so the court's obligation is confined to deciding whether or not, having regard to the way in which the evidence was obtained, it would be fair to admit it.'[35] The idea that a breach of Article 8 might be able to result in the automatic inadmissibility of any resulting evidence was greeted with horror: 'What [counsel for the appellants] is saying is that the court is bound to exclude any evidence obtained in breach of

[31] [2001] 1 Cr App R 20 (p 299), [15]–[17].
[32] [2001] EWCA Crim 973, [2001] 2 Cr App R 29 (p 591), [33]. See also *R v Lawrence* [2002] Crim LR 584.
[33] *The Times*, 28 April 2000.
[34] Quotation from transcript from Smith Bernal.
[35] [2005] EWCA Crim 516, [23].

Article 8 because otherwise it would be acting unlawfully. This is a startling proposition and one which we are pleased and relieved to be able to reject.'[36]

In sum, therefore, the approach taken is that a court's 'powers to regulate the admission of evidence, pursuant inter alia to s 78 and its inherent jurisdiction, represent means of ensuring that Article 6 is not infringed. … unlawfully obtained evidence may be inadmissible but is not *ipso facto* so. Nor is a trial in which it is relied upon necessarily unfair.'[37] It is undeniable that the maintenance of this approach by the domestic courts of England and Wales has been assisted in no small measure by *Khan v UK* and other jurisprudence from the European Court of Human Rights.

2.3.3 Conclusion

The law of England and Wales on illegally obtained evidence may be said to be characterised by the general absence of fixed rules of automatic inadmissibility or other 'bright-line' rules. Rather, a case-by-case approach is favoured, with the prevailing view being that a trial court will generally be justified in admitting an item of illegally obtained evidence so long as it has given due consideration to whether to exclude the evidence in the exercise of discretion, taking into account in particular any danger that it might be unreliable. Note that while reliability is clearly important to the appellate courts, they are certainly *not* saying that trial courts *must not* exclude illegally obtained evidence which is reliable. [At the Washington DC conference, I seemed inadvertently to have given the national reporter for Spain the impression, much to her consternation, that English law *required* the *admission* of illegally obtained evidence if it was reliable.]

3. Do the consequences vary with the gravity of the matter (*eg*, are there special rules for serious crimes)?

The appellate courts of England and Wales have not explicitly stated that they should so vary. There are indications, however, of such a view having been taken implicitly. For example, as seen above, the Grand Chamber of the European Court of Human Rights in *Jalloh v Germany* appeared to take this view. See also *R v Veneroso*,[38] where the Crown Court at Inner London excluded evidence of the finding of drugs on the basis that the police officers, although acting in good faith, had not acted lawfully under section 17(1)(e) of the Police and Criminal Evidence Act 1984 because there was no evidence that they needed to enter the premises to save life or limb or prevent serious damage to property. This, the Court considered, constituted a clear breach of Article 8, and as the public interest in bringing the defendant to trial did not outweigh the need to protect his rights under Article 8 (a situation which might, the Court thought, have been different if, for example, Semtex had been found), the evidence should be excluded under section 78(1).

4. Do the rules that apply to evidence obtained by the prosecution differ from those that apply to the defense?

The issues have really been considered only in the context of prosecution evidence.

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[36] Ibid, [24].
[37] *R v Hardy* [2002] EWCA Crim 3012, [2003] 1 Cr App R 30 (p 494), [18]–[19].
[38] [2002] Crim LR 306.

5. Describe the practical effect of these rules and how they are applied by the courts.

Practical effect: Would depend on how crucial the evidence is. If crucial, its exclusion could result in the prosecution collapsing.

How applied: Hard to say in the absence of comprehensive empirical research into what trial courts are actually doing on a case-by-case basis, particularly with respect to the wide section 78(1) discretion.

Presenting Evidence

6. Does the law in your country prohibit certain means of presenting evidence (*eg*, hearsay testimony) due to concerns about its probative value?

There are many exclusionary rules that can be considered here. I will concentrate on two key rules: the rule prohibiting the introduction of evidence of bad character in criminal cases except in specified circumstances, and the rule prohibiting the introduction of hearsay evidence in criminal cases except in specified circumstances.

7. What are the legal/procedural consequences of presenting evidence by such means?

7.1 Bad character evidence

The relevant law is contained in the Criminal Justice Act 2003. Evidence of a person's bad character is 'evidence of, or of a disposition towards, misconduct on his part, other than evidence which—(a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence'.[39] 'Misconduct' is defined as 'the commission of an offence or other reprehensible behaviour'.[40]

Evidence of the bad character of a **defendant** is admissible in any one of seven situations, often referred to as the seven 'gateways'. Section 101(1) provides:

> In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
> (a) all parties to the proceedings agree to the evidence being admissible,
> (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
> (c) it is important explanatory evidence,
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
> (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
> (f) it is evidence to correct a false impression given by the defendant, or
> (g) the defendant has made an attack on another person's character.

[39] S 98.
[40] S 112(1).

The most controversial of these is gateway (d), which represents an attempt to water down the old common law 'similar fact evidence' rule, which required evidence adduced by the prosecution of a defendant's bad character to satisfy a *heightened* degree of relevance in order to be admissible. Under gateway (d), however, prosecution evidence[41] of a defendant's bad character is admissible on the basis of its mere *relevance* to an important matter in issue between the defendant and the prosecution. By virtue of section 103(1)(a), whether the defendant has 'a propensity to commit offences of the kind with which he is charged' constitutes a matter in issue between the defendant and the prosecution if such propensity is relevant to guilt of the offence charged. Such propensity may be established by evidence of a conviction of an offence of the same description[42] or an offence of the same category,[43] so long as section 103(3) is satisfied. Section 103(3) requires that the court be satisfied that establishing propensity in such a manner would not be unjust 'by reason of the length of time since the conviction or for any other reason'. It is provided that 'two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms',[44] and that 'two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State'.[45] Such an order may be made only in respect of offences of the same type.[46] An order has been made prescribing two categories of offences: a category of theft offences and a category of sexual offences involving persons under the age of 16.[47]

In relation to **non-defendants**, section 100(1) provides:

> In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
>
> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which—
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> (i) is a matter in issue in the proceedings, and
>
> (ii) is of substantial importance in the context of the case as a whole, or
>
> (c) all parties to the proceedings agree to the evidence being admissible.

7.2 Hearsay evidence

The four possible gateways for the admissibility of hearsay evidence in criminal cases are set out in section 114(1) of the Criminal Justice Act 2003, which provides:

> In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—
>
> (a) any provision of this Chapter or any other statutory provision makes it admissible,

[41] S 103(6).
[42] S 103(2)(a).
[43] S 103(2)(b).
[44] S 103(4)(a).
[45] S 103(4)(b).
[46] S 103(5).
[47] Criminal Justice Act 2003 (Categories of Offences) Order 2004.

(b) any rule of law preserved by section 118 makes it admissible,
(c) all parties to the proceedings agree to it being admissible, or
(d) the court is satisfied that it is in the interests of justice for it to be admissible.

Gateway (d) is particularly noteworthy, as it introduced a route to admissibility previously unrecognised in the law of England and Wales. Section 114(2) provides that, in deciding whether hearsay evidence should be admitted under this gateway,

> 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.

8. Do the consequences vary with the reliability of the evidence and its necessity for the record?

To some extent the considerations of reliability and necessity are inherent in the relevant statutory provisions.

9. Do different rules apply to the evidence relevant to the claim or the defence?

Again, the idea that there should be more controls on prosecution evidence than on defence evidence is inherent in the relevant statutory provisions. For example, in the context of evidence of a defendant's bad character, gateways (d) and (g), which apply to potential prosecution evidence, are subject to section 101(3). Section 101(3) provides that evidence falling under gateway (d) or gateway (g) is not to be admitted 'if, on an application by the defendant to exclude it, it appears to the court that 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'. In considering this duty 'the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged'.[48]

[48] S 101(4).

In the context of hearsay evidence, certain safeguards pertaining to hearsay evidence adduced by the prosecution appear in the Criminal Justice Act 2003 itself. For example, section 125(1) 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,
>
> 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.

Further, section 126(1) provides:

> In criminal proceedings the court may refuse to admit a statement as evidence of a matter stated if—
>
> (a) the statement was made otherwise than in oral evidence in the proceedings, and
>
> (b) the court is satisfied that the case for excluding the statement, taking account 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.

Note also that in *R v Y*[49] the Court of Appeal regarded as significant the fact that it was the prosecution rather than the defence that was seeking to invoke section 114(1)(d) of the Criminal Justice Act 2003. The Court urged caution in determining the admissibility of hearsay evidence that inculpated, rather than exculpated, the defendant.

10. Describe the practical effect of these rules and how they are applied by the courts.

A growing body of case law on the relevant statutory provisions is emerging from the Court of Appeal of England and Wales. One thing that has become apparent is the reluctance of the Court of Appeal to interfere with the application of the provisions by a trial court. In the context of bad character evidence, the Court of Appeal made it clear that 'this court will be very slow to interfere with a ruling . . . as to admissibility . . . It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense …'.[50]

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[49] [2008] EWCA Crim 10, [2008] 1 WLR 1683.

[50] *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169, [15]. This is because 'the trial judge's "feel" for the case is usually the critical ingredient of the decision at first instance which this court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called "authority", in reality representing no more than observations on a fact-specific decision of the judge in the Crown Court, is unnecessary and may well be counter-productive': *R v Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948, [3]. See also *R v Lawson* [2006] EWCA Crim 2572, [2007] 1 WLR 1191, [39].

In the context of hearsay evidence, the relevant case law appears to confirm that a determination of admissibility under section 114(1)(d) is – given the extensive range of factors enumerated in section 114(2) - a fact-specific exercise with which an appellate court would be reluctant to interfere.[51]

11. Further remarks

The stability of the hearsay provisions of the Criminal Justice Act 2003 is currently doubtful. The crucial question is whether the application of the provisions may, in certain circumstances, breach Article 6(3)(d) of the European Convention on Human Rights, which guarantees everyone charged with a criminal offence the right 'to examine or have examined witnesses against him'. In *Al-Khawaja and Tahery v UK*[52] in January 2009, the European Court of Human Rights appeared to propound a rule whereby the introduction of hearsay evidence 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 opportunity at some stage to cross-examine the maker of the relevant statement, or unless the maker of the statement was kept from giving evidence through fear induced by the defendant.[53] Subsequently, in *R v Horncastle*,[54] the UK Supreme Court, sitting with seven members, had the opportunity to consider the issue. The Supreme Court declined to follow *Al-Khawaja and Tahery v UK*. Reiterating the traditional position of the courts of England and Wales, the Supreme Court held unanimously that proper application of the provisions of the Criminal Justice Act 2003 would represent a 'less draconian' way of protecting against the risk of an unsafe conviction than would the application of a 'sole or decisive' test.[55]

Subsequent to 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, and the case was heard by the Grand Chamber on 19 May 2010. The judgment of the Grand Chamber is currently awaited with great anticipation.

[51] See eg *R v Finch* [2007] EWCA Crim 36, [2007] 1 WLR 1645, [23]: '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.'
[52] (2009) 49 EHRR 1.
[53] Ibid, [37].
[54] [2009] UKSC 14, [2010] 2 AC 373.
[55] Ibid, [92].