The scenario presented the Chamber with a stark choice in *realpolitik*, and the notion of subsidiarity very much pervades the judgment. If the holding had been that kettling was a deprivation of liberty, the police would have been very hard pushed to justify the tactic with reference to any of the permitted exceptions in Article 5(1): "Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfill their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness": (at [54]).

Austin does not provide the police with a *carte blanche* to contain when it is no longer necessary in order to prevent serious injury or damage; the Court could not exclude "that the use of containment and crowd control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty in breach of Article 5(1)" (at [60]). That, however, provides little guidance for future development. Given the obvious chill on those wishing to protest, some better indicia (such as those set out by Lord Neuberger in the House of Lords at [57]) for national courts and police would have been of greater assistance.

DAVID MEAD

RECONCILING THE IRRECONCILABLE?

SOMETIMES witnesses die before they can give their evidence in court. In such circumstances, the Crown might seek to admit the witness's previous out-of-court statements regarding the alleged offence. The difficulty is that the assertions contained within these statements will probably constitute hearsay evidence, as defined in sections 114–115 of the Criminal Justice Act 2003 ("CJA"). This is because, in making those statements, the witness presumably intended to make another person (e.g. a police officer) believe certain matters. The preconditions to admissibility set out in section 116 of CJA 2003 must therefore be met before the finder of fact can hear the relevant contents of the dead witness's out-of-court statements. First, the matters addressed in those statements must be ones upon which, were she alive, the witness could give admissible oral evidence. Secondly, the witness must be identified to the court's satisfaction.

The second of these preconditions is important, because knowing the identity of the dead witness allows the defendant the chance to challenge her credibility and cast doubt on the reliability of the hearsay evidence (see, further, CJA 2003, s. 124). The question is whether this simple opportunity will always be sufficient to compensate for the fact

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that cross-examining the witness at trial – a right guaranteed under Article 6(3)(d) of the European Convention on Human Rights – is impossible.

Frustratingly, there are two competing answers provided by the leading cases. In *R. v Horncastle* [2009] UKSC 12, [2010] 2 A.C. 1, the Supreme Court suggested that the evidence of a dead witness admitted under section 116 of CJA 2003 might compromise the fairness of the trial where it was both central to the Crown's case and *unconvincing* (e.g. at [79]). The concern was with the seeming reliability of the hearsay evidence, rather than the defendant's ability to challenge it. By contrast, the Grand Chamber of the European Court of Human Rights' decision in *Al-Khawaja and Tahery v United Kingdom* (2012) 54 E.H.R.R. 23 (noted [2012] C.L.J. 257) suggested that the defendant's ability (or lack thereof) to challenge a dead witness's evidence was *also* of crucial importance to the question of whether the trial had been fair (e.g. at [142]). Even reliable hearsay evidence might, on the Grand Chamber's view, render a trial unfair if it was central to the Crown case and the defendant could not combat it effectively.

The Court of Appeal was presented with an opportunity to consider these divergent approaches in *R. v Ibrahim* [2012] EWCA Crim 837. The defendant had been convicted of raping three different women. The complainant in the first rape had died prior to the trial and the prosecution case had been founded almost exclusively on her previous out-of-court statements. The question was whether the defendant's right to a fair trial had thereby been infringed. It was held, ultimately, that the relevant rape conviction had to be quashed, because the evidence upon which it was based was too unreliable. (The defendant's sentence of ten years' imprisonment for the other two rapes was, however, upheld.)

In reaching this conclusion about the hearsay evidence, the court denied that there are any significant differences between the decisions of the Supreme Court and the Grand Chamber (at [88]). The Court of Appeal's analysis of two vital guarantees of the defendant's fair trial – the trial judge's powers to exclude "unfair" hearsay evidence, and to stop a trial entirely where the Crown's case is premised on unconvincing hearsay evidence – can, as a result, be read to support the different views advanced in *Horncastle* and *Al-Khawaja*.

The most relevant exclusionary power available to trial judges is conferred by section 78 of the Police and Criminal Evidence Act 1984 (see, also, CJA 2003, s. 126(2)(a)). This can be used where the Crown seeks to rely on evidence which, "having regard to all the circumstances, including the circumstances in which the evidence was obtained … would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it". The trial judge had

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not been asked to exclude the complainant's hearsay evidence at trial, but the Court of Appeal suggested that, if he had, he would have considered the centrality of the statements to the Crown's case, as well as the various factors set out in section 114(2) of CJA 2003 (at [106]). These factors are designed to help trial judges decide whether it would be in the "interests of justice" to admit otherwise inadmissible hearsay evidence under section 114(1)(d) of the CJA 2003.

There is a danger in adopting section 114(2)'s considerations of the "interests of justice" here. Trial judges might be invited by counsel to consider the "interests of justice" at the stage of asking whether the evidence contained within a dead witness's out-of-court statements is *prima facie* admissible. As seen above, section 116 of the CJA 2003 makes it clear that this is unnecessary. Usually, a dead witness's hearsay evidence is readily *prima facie* admissible, and it is important to keep in view that the question under section 78 is whether that evidence should nevertheless be *excluded*, principally to ensure that the defendant receives a fair trial. The "interests of justice" factors in section 114(2) do give some indication of the kind of considerations that the Court of Appeal thinks are relevant to the latter question. They do not, however, resolve the conflict between *Horncastle* and *Al-Khawaja*.

Insofar as section 114(2)'s factors seem applicable to cases involving dead witnesses, they are concerned mainly with the reliability of the evidence, supporting the Supreme Court's view in *Horncastle*. These focus on: the probative or explanatory value of the evidence in relation to a matter in issue; the other evidence available to the parties to prove that issue; the importance of that issue to proceedings; the circumstances in which the hearsay statement was made; and the reliability of the statement's maker. The final two factors in section 114(2) deal, however, with the defendant's ability to challenge the hearsay evidence, i.e. the additional element emphasised in *Al-Khawaja* (see, further, *R. v Y* [2008] EWCA Crim 10, [2008] 1 W.L.R. 1683 at [56]). They concern: "the amount of difficulty involved in challenging the statement" and "the extent to which that difficulty would be likely to prejudice the party facing it". The Court of Appeal did not explain which of these factors were decisive in *Ibrahim*, but was confident that – had they been considered – the complainant's evidence would have been excluded (at [106]).

The Court of Appeal also concluded that the trial judge should, as he *was* asked to do, have directed the defendant's acquittal on the relevant rape count. The power to do this (or discharge the jury and instigate a retrial) is exercisable where "the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and … the evidence provided by the statement is so unconvincing that, considering its importance to the case against the

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defendant, his conviction of the offence would be unsafe" (CJA 2003, s. 125(1)). The wording of this section suggests *reliability* is again of core concern to trial judges asked to stop a trial involving hearsay evidence from a dead witness. So, naturally, the Court of Appeal focussed upon it (see, e.g., at [109]).

It might be premature, however, to conclude that the Court of Appeal has favoured the reliability-only approach in *Horncastle* over the more onerous view adopted in *Al-Khawaja*. The court was, after all, faced in *Ibrahim* with hearsay evidence that was crucial to the case against the defendant, and was clearly unreliable: the complainant's statements contained inconsistencies, and the other prosecution evidence partially contradicted them. Furthermore, there was no suggestion that the defendant could not challenge the complainant's evidence – he appears to have done so quite effectively.

Things might have been different if the other prosecution evidence had been consistent with the complainant's account, and the defence had had no means of countering it. The Court of Appeal made clear in *Ibrahim* that, had it detected a significant difference between *Horncastle* and *Al-Khawaja* (which, in these altered circumstances, it ought to have), it would have followed the Supreme Court's lead (at [87]). The Court of Appeal must *consider* relevant Strasburg jurisprudence (Human Rights Act 1998, s. 2), but is, ultimately, bound by the Supreme Court's precedents. The correct course would thus have been to refuse to quash the conviction, note the relevant aspect of the Grand Chamber's opinion, and grant the defendant leave to appeal to the Supreme Court (see, further, *R. (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 A.C. 311 at [64]). This variation on the facts of *Ibrahim* will no doubt arise in due course. Until then, trial judges should be suspicious of the ease with which the Court of Appeal claims *Horncastle* and *Al-Khawaja* may be reconciled.

FINDLAY STARK

CROSSING THE CORPORATE VEIL: THE DUTY OF CARE OWED BY A PARENT COMPANY TO THE EMPLOYEES OF ITS SUBSIDARY

IN *Chandler v Cape plc* [2012] EWCA Civ 525 the Court of Appeal upheld a High Court decision that a parent company owed an employee of its subsidiary company a duty of care to advise on, or ensure, a safe system of work.

The facts of *Chandler* are sadly similar to other well-known asbestos cases. In 1959 and again in 1961–62, Mr Chandler stacked and loaded bricks for Cape Building Products Ltd ("Cape Products"), a wholly

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