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UNFAIR CONSEQUENCES: HOW THE REFORMS TO THE RULE AGAINST HEARSAY IN THE CRIMINAL JUSTICE ACT 2003 VIOLATE A DEFENDANT’S RIGHT TO A FAIR TRIAL UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract: For years, judges and legislatures in common-law jurisdictions have struggled to develop effective and equitable rules regarding the admissibility of hearsay statements. Particularly in criminal cases, in which a defendant’s very liberty is often at stake, governments have endeavored to strike the balance between the prosecution’s need for probative evidence against the accused and the defendant’s right to cross-examine those who have made statements against him. Parliament attempted to achieve such parity when it passed the Criminal Justice Act 2003, a watershed piece of legislation that significantly liberalized the admissibility of hearsay statements in English and Welsh criminal trials. Because the Act allows the jury to convict the defendant based on uncorroborated hearsay evidence alone, however, it contravenes the defendant’s right to a fair trial under the European Convention on Human Rights.

Introduction

In June of 1997, the Law Commission for England and Wales (Commission) released a report on possible reforms to the rule against hearsay in criminal trials.1 The report, entitled “Evidence in Criminal Proceedings: Hearsay and Related Topics,” proposed sweeping changes to the laws governing hearsay in criminal cases.2 The

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Commission included a model statute at the end of the report that incorporated its recommendations to the Parliament of the United Kingdom (Parliament) in a statutory format.³

Parliament incorporated the Commission’s recommendations in the Criminal Justice Act 2003 (CJA).⁴ which received Royal Assent and became law on November 20, 2003.⁵ Yet, because the CJA significantly liberalizes the admission of hearsay evidence in criminal trials, it may contravene the Convention for the Protection of Human Rights and Fundamental Freedoms, a treaty more popularly known as the European Convention on Human Rights (Convention).⁶ In particular, the relaxed admissibility standards in the CJA may offend a defendant’s right to confront witnesses, a privilege that the Convention guarantees.⁷

This Note explores whether the CJA, in its current form, complies with the mandates of the Convention. Specifically, the paper examines the Convention’s confrontation clause and its relationship to the admissibility of hearsay evidence in criminal trials. Part I discusses the most recent legislative developments in England and Wales concerning hearsay, and will outline the history of the Convention. Part II explains the Commission’s proposed reforms, and also examines the European Court of Human Rights’ (ECHR) interpretation of a defendant’s right of confrontation under the Convention. Part III makes the claim that the CJA does, in fact, offend a criminal defendant’s rights under the Convention and therefore must be amended.

I. BACKGROUND

A. Changes in Hearsay Law in England and Wales

Parliament created the Law Commission for England and Wales in 1965 “to keep the law of England and Wales under review and to recommend reform when it is needed.”⁸ The Commission publishes

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³ See generally id. at app. A (containing the Commission’s Draft Bill of Evidence).
⁷ See id. art. 6(3) (d), 213 U.N.T.S. at 228.
provisional reform proposals and collects feedback and critical commentary on those ideas.\footnote{9} Then, after incorporating those suggestions it feels are warranted, the Commission submits a final proposal before Parliament.\footnote{10}

In recent years, sometimes with the help of the Commission, Parliament has significantly modified the laws relating to the admissibility of hearsay evidence in England and Wales.\footnote{11} A 1993 report by the Commission stressed the need for Parliament to abolish the exclusionary rule against hearsay in civil cases.\footnote{12} That study led to the passage of the Civil Evidence Act 1995 that implemented the hearsay reforms that the Commission had advised were necessary.\footnote{13} The Civil Evidence Act 1995 defines all hearsay evidence as admissible, but also allows the judge to determine the weight that he or she should accord to that evidence.\footnote{14}

Until Parliament passed the CJA, the application of the rule against hearsay in criminal proceedings was governed primarily by the Criminal Justice Act 1988.\footnote{15} This Act retained the traditional common law exceptions to the hearsay rule, including, \textit{inter alia}, admissions and confessions of parties and their agents, statements by deceased persons, testimony concerning reputation, and public documents.\footnote{16} The Criminal Justice Act 1988 also created additional exceptions for statements contained in documents, and both the term “statements” and the term “documents” were “widely defined.”\footnote{17} Unfortunately, instead of clarifying application of the rule against hearsay, this Act added to the numerous exceptions to the rule and further confused many practitioners.\footnote{18} Because the rule itself and its seemingly endless parade of exceptions continued to confuse the legal community, the

\footnotesize{\begin{itemize}
\item \footnote{9} Id.
\item \footnote{10} Id.
\item \footnote{11} See, \textit{e.g.}, Civil Evidence Act, 1995, c. 38 (Eng.) (presenting a novel approach to the admissibility of hearsay in civil proceedings).
\item \footnote{12} See \textsc{Law Commission for England and Wales}, \textsc{Report on Hearsay in Civil Trials} 24 (1993), \textit{available at} http://www.lawcom.gov.uk/files/lc245.pdf (last visited May 1, 2005).
\item \footnote{13} See \textit{generally} Civil Evidence Act, 1995, c. 38 (Eng.) (applying the Commission’s recommendations). Specifically, the Act declares that all hearsay evidence in civil trials is henceforth admissible, but also directs the judge to consider the amount of weight to accord to the evidence. \textit{See id.} §§ 1, 4.
\item \footnote{14} Id. § 4.
\item \footnote{15} See \textsc{Law Commission for England and Wales}, \textit{supra} note 2, at 19–22.
\item \footnote{16} See \textit{id.} at 17–18; \textit{see also} Criminal Justice Act, 1988, c. 33, §§ 23–28.
\item \footnote{17} \textsc{Law Commission for England and Wales}, \textit{supra} note 2, at 19.
\item \footnote{18} \textit{See id.} at 48–50.
\end{itemize}}
Secretary of State for Home Affairs asked the Commission in 1994 to consider whether the law of England and Wales relating to hearsay evidence in criminal cases needed to change.\footnote{Id. at 1.}

The Royal Commission on Criminal Justice (RCCJ) had recommended that the Secretary make the request to the Commission because the RCCJ believed the law governing hearsay in criminal cases to be “exceptionally complex and difficult to interpret.”\footnote{Id. (quoting Royal Commission on Criminal Justice, Report, ch. 8, para. 26 (1993)).} In order to ameliorate the situation, the RCCJ suggested that the Commission ponder the efficacy of a law that would relax—or even abolish—the rule against the admission of hearsay in criminal trials.\footnote{See id. at 1–2 (quoting Royal Commission on Criminal Justice, Report, ch. 8, para. 26 (1993)).}

This particular recommendation, which, if eventually implemented, would significantly curtail the common-law rule against hearsay,\footnote{See Law Commission for England and Wales, supra note 2, at 1 (stating that “[t]he Royal Commission advocated major reform” when it made its statements about hearsay in criminal proceedings).} was not a complete surprise to the Commission. Indeed, the Commission had agreed with the same suggestion in its report on hearsay in civil trials.\footnote{See Law Commission for England and Wales, supra note 12, at 24.} Despite the fact that the Commission was treading on familiar ground, however, recommending hearsay reform in criminal trials involved different, more complicated questions.

First of all, the decreased role of the jury in civil trials caused much of the support for reform of the rule against hearsay in civil proceedings.\footnote{See generally Sally Lloyd-Bostock & Cheryl Thomas, Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales, 62 LAW & CONTEMP. PROBS. 7 (1999) (chronicling the decline of the jury in English and Welsh trials).} One of the core purposes of common-law courts’ exclusion of hearsay is to protect the jury from considering untrustworthy evidence to be inherently true and valid.\footnote{See Law Commission for England and Wales, supra note 2, at 28–29 (footnotes omitted).} Although civil trials in England and Wales used to be conducted in front of juries, it is extremely rare now for these proceedings to involve juries.\footnote{See Lloyd-Bostock & Thomas, supra note 24, at 7–8.} Because judges, who are legally trained and thus more aware of the dangers of hearsay evidence, now act as factfinders in the great majority of civil cases, both the Commission and Parliament found that there was little
need for this prophylactic exclusion of evidence. The judge would just have to make an informed choice about how much weight to accord to the hearsay evidence. Parliament codified this approach in the Civil Evidence Act 1995. Yet the Commission could not make the same argument regarding hearsay in criminal proceedings because those cases are still tried by juries in England and Wales.

Furthermore, the Commission could not rely upon its earlier analysis of hearsay in civil cases because, generally, the stakes are higher in criminal trials than in civil ones. Because a criminal conviction is the ultimate form of societal moral condemnation, the government of the United Kingdom would not want to convict an innocent defendant on erroneous information contained in a hearsay statement. Thus, the Commission needed to scrutinize the question of hearsay reform in criminal cases more carefully than it had in its report on hearsay in civil proceedings.

B. Hearsay and The European Convention on Human Rights

In addition, the Commission needed to pay close attention to the mandates of the European Convention on Human Rights. After experiencing the atrocities of World War II, a number of European countries decided to codify certain inalienable rights within a treaty, and the Convention was the result of their labors. The rights contained in the document echoed those that the United Nations had recently recognized in its Universal Declaration of Human Rights.

Provisions in the Convention established the ECHR and gave the court jurisdiction to decide whether a member country had violated

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27 See Law Commission for England and Wales, supra note 12, at 23–24.
28 See id. at 29–30.
29 Civil Evidence Act, 1995, c. 38, § 4 (Eng.).
30 See Lloyd-Bostock & Thomas, supra note 24, at 13.
31 Cf. European Convention on Human Rights, supra note 6, art. 6(3), 213 U.N.T.S. at 228 (enumerating special rights for criminal defendants alone).
32 See Law Commission for England and Wales, supra note 2, at 32.
33 See id.
34 See generally European Convention on Human Rights, supra note 6 (binding its signatories to its terms and guaranteeing minimum rights to everyone charged with a criminal offense).
the Convention.\textsuperscript{37} The parties to the treaty also agreed that the ECHR could bestow just satisfaction upon harmed parties, and that the member countries would abide by the decisions of the court.\textsuperscript{38} Thus, as a party to the treaty, the government of the United Kingdom must adhere to the Convention’s dictates on the inherent rights of criminal defendants.\textsuperscript{39}

Furthermore, the United Kingdom is one of the many signatories of the Convention that has incorporated the treaty into its own law.\textsuperscript{40} Thus, if an English subject wishes to challenge his criminal conviction because he believes it offends the Convention, the English appellate courts must rule on that question.\textsuperscript{41} In fact, the ECHR will not consider a case until after the aggrieved party has exhausted all state remedies.\textsuperscript{42}

When the ECHR does agree to hear a case, it does not sit as a single panel.\textsuperscript{43} Instead, proceedings take place before a chamber of seven judges, or, from time to time, before a Grand Chamber of seventeen judges.\textsuperscript{44} Because more than forty judges currently sit on the ECHR, and the panels consist of seventeen jurists at most, there is never a time when all of the judges hear a case together.\textsuperscript{45} Thus, the panels that decide the cases do not have the consistency and continuity of the U.S. Supreme Court.\textsuperscript{46}

II. Discussion

The rule against hearsay in England and Wales is generally defined as follows: “any assertion other than one made by a person

\textsuperscript{37} See European Convention on Human Rights, supra note 6, art. 19, 213 U.N.T.S. at 234; Kirst, supra note 35, at 777.

\textsuperscript{38} See European Convention on Human Rights, supra note 6, art. 19, 213 U.N.T.S. at 234.

\textsuperscript{39} See European Convention on Human Rights, supra note 6, arts. 6(3), 46, 213 U.N.T.S. at 228, 246. It is important to note, however, that the ECHR has no power to reverse a conviction or to order any comparable action by a municipal court. Kirst, supra note 35, at 781.

\textsuperscript{40} See Human Rights Act, 1998, c. 42 (Eng.), §§ 1–4; Council of Eur., The European Convention on Human Rights, at http://www.humanrights.coe.int/intro/eng/GENERAL/ECHR.HTM (last visited May 11, 2005). Ireland and Norway are the only parties to the Convention that have not included the document as part of their own domestic laws. Id.

\textsuperscript{41} See Human Rights Act, 1998, c. 42 (Eng.), §§ 2, 4.

\textsuperscript{42} See Kirst, supra note 35, at 780; Council of Europe, supra note 40.

\textsuperscript{43} Kirst, supra note 35, at 780.

\textsuperscript{44} Id.

\textsuperscript{45} See id.

\textsuperscript{46} Id. at 780–81.
while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.” 47 The theory behind the rule is that it protects juries from hearing or seeing evidence that may be patently false or untrue. 48 Because the author of a hearsay statement is neither under oath nor subject to cross-examination at the time she makes the statement, it is impossible to know if the statement actually is true. 49 Over time, through both the common-law process 50 and legislation, 51 the general rule evolved to include many exceptions that allow parties to introduce hearsay evidence at trial. 52 Most exceptions involve certain types of evidence that lawmakers believed were inherently reliable despite the fact that they are based on hearsay. 53 After witnessing the confusion surrounding interpretation of the hearsay exceptions in the Criminal Justice Act 1988, practitioners and judges alike hoped for more sensible admissibility rules. 54

A. The Commission’s Hearsay Analysis

The goal of the Commission in its report on criminal hearsay was to simplify and rationalize the application of the rule against hearsay. 55 Well aware of the consequences of changing evidence rules in criminal cases, the Commission came to its conclusions by carefully considering all of the arguments that could be made against further liberalizing admission of hearsay evidence in criminal proceedings. 56

First, the Commission considered the proposition that hearsay evidence, by its nature, is not the “best evidence” upon which factfinders could rely. 57 It concluded, however, that the many exceptions to the hearsay rule show that hearsay is, quite often, the best available evidence. 58 If hearsay could never be the best evidence, there would be no need for admissibility of any hearsay evidence at any time, because some other piece of “better” evidence could sup-

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47 Law Commission for England and Wales, supra note 2, at 16 (citation omitted).
48 See id. at 23.
49 See id.
50 See id. at 17–18.
51 See id. at 18–22.
52 See Law Commission for England and Wales, supra note 2, at 17–22.
53 See id. at 23–24.
54 See id. at 1–2.
55 See id. at 2.
56 See id. at 23–34 (discussing the merits of the justifications for a strict rule against hearsay).
57 See Law Commission for England and Wales, supra note 2, at 23–24.
58 See id.
The many exceptions to the rule against hearsay belie this assumption; judges and legislatures never would have created the exceptions unless such hearsay evidence was the best available evidence.60

The Commission then worried about the chance that a criminal defendant “could produce in evidence a letter or witness statement in which the declarant—alas, now unavailable—claims to have seen the offense being committed by someone other than the defendant” or perhaps one that supports his alibi.61 Such evidence could then raise reasonable doubt in the minds of the jury, and the guilty man would go free.62 Although this possibility concerned the Commission, it ultimately felt that they could avoid this danger by retaining the exclusionary rule for instances of multiple hearsay and hearsay from unidentified witnesses.63

The Commission next considered the fact that hearsay evidence is not delivered by people under oath.64 It quickly dismissed this objection because there is no guarantee that an oath or affirmation, in itself, promotes truthful testimony.65 Instead, the Commission was more concerned about “the objection to hearsay most strongly pressed today[,]” namely the lack of an opportunity to cross-examine the author of a hearsay statement.66 After admitting that cross-examination is not always probative of the truth, the Commission nonetheless found this particular rationale for the rule against hearsay to be the most valid.67 Yet the Commission also felt that “even this justification is not valid for all hearsay, and in any event it does not justify the current form of the hearsay rule.”68

The next subject that the Commission discussed in its report was the danger that juries would assign undeserved probative force to hearsay evidence.69 Many commentators doubt the competence of jurors to understand the complex jury instructions that would be necessary to inform them of the possible untrustworthiness of hearsay

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59 See id.
60 See id.
61 Id. at 24.
63 See id. at 25.
64 Id. at 26.
65 Id. at 27.
66 Id.
67 See Law Commission for England and Wales, supra note 2, at 28.
68 Id.
69 See id. at 28–29.
The Commission rejected this argument, reasoning that judges often give juries complicated instructions on other points of law, and society assumes that the jury understands them. Because the Commission was confident in the jury’s ability to comprehend warnings on hearsay, it found that it could justify a recommendation for additional exceptions to the rule against hearsay.

The Commission also considered another argument against liberalization of the rule against hearsay: the right of a defendant to confront witnesses against her. Its rationale is based upon the premise that it is easier to lie to someone behind her back rather than to her face. The Commission noted, however, that recent developments in England and Wales show that this view is no longer persuasive in those countries. Nevertheless, the Commission conceded that “it is desirable for witnesses to give their evidence in the presence of the accused if possible,” but also commented that “there are other factors which may outweigh the need for this[,]” such as “the impossibility of obtaining the evidence directly from the witness in the courtroom.”

Thus, after discussing the pervasive rationales for the exclusionary rule against hearsay, the Commission concluded that the only reason that hearsay is inferior evidence is because advocates cannot test it through cross-examination. Therefore, the Commission drafted its reform recommendations with the notion that the inability to cross-examine is the sole defect in admitting hearsay into evidence. After contemplating the merits of several methods of reform, the Commission set forth a Draft Criminal Evidence Bill (Draft Bill) that incorporated the Commission’s recommendations to Parliament.

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70 See, e.g., id. (quoting Sir Patrick Devlin, Trial By Jury 114 (revised 3d impression 1965)).
71 See id. at 30–31.
72 See Law Commission for England and Wales, supra note 2, at 31–32.
73 See id. at 33–34.
74 Id. at 33.
75 See id. (mentioning how England and Wales permit witnesses to give evidence from behind a screen, or via closed circuit television).
76 Id.
77 Law Commission for England and Wales, supra note 2, at 33 n.74.
78 Id. at 34.
79 See id.
80 See id. at app. A.
B. The Criminal Justice Act 2003

When Parliament formulated the hearsay provisions of the CJA, it used the Commission’s Draft Bill as its principal model.\(^{81}\) In fact, Parliament copied several sections of the CJA nearly verbatim from the Draft Bill.\(^{82}\) The lengthy CJA begins by abolishing the traditional rule that hearsay is barred from evidence unless an exception exists that allows its admission.\(^{83}\) Instead, the statute states that hearsay is admissible, but only under certain circumstances.\(^{84}\) Of course, this is simply the corollary to the traditional rule; to say that hearsay is admissible only in certain exceptional situations is to say that hearsay is inadmissible unless those exceptional situations exist.\(^{85}\) Thus, although the CJA does not refer to its provisions as “exceptions” per se, from a practical standpoint, they function as exceptions to the rule against hearsay.

The statute, like the U.S. Federal Rules of Evidence, contains different exceptions depending upon whether the author of a hearsay statement is available or unavailable to give testimony at trial.\(^{86}\) A person is unavailable under the statute if she is dead, mentally or physically unfit to be a witness, outside the U.K. and it is not practical to secure her attendance, cannot be found after reasonable endeavors to locate her, or is in “fear” and the court allows her to not testify.\(^{87}\) The statute notes that courts should construe “fear” liberally; for example, a court could consider a witness who is afraid of financial loss due to her testimony to be in “fear.”\(^{88}\) However, the court must first grant leave before admitting a hearsay statement into evidence because its author is in “fear,” and the court should only do so “if [it] considers that the statement ought to be admitted in the interests of justice.”\(^{90}\)

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81 See Criminal Justice Act, 2003, c. 44 (Eng.), Explanatory Notes, para. 50, available at http://www.hmso.gov.uk/acts/en2003/03en44-a.htm (last visited May 1, 2005). The Criminal Justice Act 2003 is a very long and complex statute. Because the focus of this Note is whether the Act’s modifications of the rule against hearsay contravene the confrontation clause of the Convention (Article 6(3)(d)), this Note will only examine those sections of the statute immediately relevant to this focus.

82 Compare, e.g., id. § 116, with Law Commission for England and Wales, supra note 2, at app. A §§ 3, 5.

83 See Criminal Justice Act, 2003, c. 44 (Eng.), § 114(1).

84 See id.

85 Compare id. with Law Commission for England and Wales, supra note 2, at app. A § 1.


87 Criminal Justice Act, 2003, c. 44 (Eng.), § 116(2).

88 Id. § 116(3).

89 Id. § 116(4).

90 Id.
The statute goes on to state that, if the court finds that a witness is unavailable, a prior statement by that witness is admissible when two conditions are met. The witness must be “identified to the court’s satisfaction,” and the statement must be such that “oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter.” In other words, an unavailable witness cannot be anonymous, and his or her statement is only admissible if it would be admissible if he or she were present.

In addition, a business record that was “prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation” is nevertheless admissible if the person who created the record is unavailable or “cannot reasonably be expected to have any recollection of the matters dealt with in the statement.” However, the judge has discretion to deem such business records inadmissible if he or she believes that the evidence is unreliable. In determining whether the evidence is trustworthy, the judge must look to the statement’s contents, the source of the information contained in the statement, the circumstances in which the information was supplied, or the circumstances in which the document was created or received.

The statute also recognizes various exceptions to the rule against hearsay when a witness is available to testify. For example, a previous statement by a testifying witness is admissible to prove the truth of its content if several conditions are met. While testifying in court, the witness must indicate that, to the best of his belief, he made the statement and it states the truth. In addition, the statement must identify or describe a person, object, or place. The witness must have made the statement “when the matters stated were fresh in his memory but he does not remember them, and cannot reasonably be expected to remember them, well enough to give oral evidence of them in the proceedings.” Furthermore, the witness must claim to

91 See id. § 116(1).
92 Criminal Justice Act, 2003, c. 44 (Eng.), § 116(1)(b).
93 Id. § (1)(a).
94 See id. § 116(1)(a)–(b).
95 See id. § 117(4)(a), § 117(5).
96 Id. § 117(6)–(7).
97 Criminal Justice Act, 2003, c. 44 (Eng.), § 117(7).
98 See, e.g., id. §§ 119–120.
99 See id. § 120(4)–(8).
100 Id. § 120(4)(b).
101 Id. § 120(5).
102 Criminal Justice Act, 2003, c. 44 (Eng.), § 120(6).
be a person against whom an offense has been committed, the offense must relate to the proceedings, and the hearsay statement must consist of a complaint by the witness about conduct which would, if proved, constitute all or part of the offense.103

This seemingly esoteric exception to the rule against hearsay is actually quite logical when divorced from its statutory language.104 The Commission included this exception in its Draft Bill in order to make admissible statements by crime victims that described elements of the crime shortly after the offense took place.105 For example, if a crime victim, soon after being attacked, described the assailant to a police officer, but cannot remember at trial exactly what he said at the time, his original statements are nevertheless admissible because of this exception.106

Perhaps the most controversial provision in the CJA pertains to judicial discretion to admit hearsay evidence that the enumerated exceptions do not specifically cover.107 Section 114(1)(d) of the statute states that hearsay evidence can be admissible “if the court is satisfied that it is in the interests of justice for it to be admissible.”108 This catchall exception is akin to the residual hearsay exception in the U.S. Federal Rules of Evidence, but its language is somewhat broader.109 Despite the elasticity of the language in 114(1)(d), it is noteworthy that the Commission, in discussing an almost identical provision in the Draft Bill, envisioned that “it would only be used exceptionally.”110

C. Hearsay Cases in the ECHR

The first case in which the ECHR dealt explicitly with criminal convictions based on hearsay evidence was Unterpertinger v. Austria.111 In that case, the defendant had been accused of assaulting his wife

103 Id. § 120(7)(a)–(c). Also, the victim must have made the complaint as soon as could reasonably be expected after the alleged conduct, the victim cannot have made the complaint because of a threat or a promise, and the witness must give oral evidence in connection with the statement before it is brought into evidence. Id. § 120(7)(d)–(f).
104 See id. § 120(4)–(8); see also Law Commission for England and Wales, supra note 2, at 156–57.
105 See Criminal Justice Act, 2003, c. 44 (Eng.), § 120(4)–(8).
106 See id. § 114(1)(d).
107 Id.
108 Compare id. with Fed. R. Evid. 807.
109 See Law Commission for England and Wales, supra note 2, at 129.
and stepdaughter, but neither testified against him at trial.\textsuperscript{112} The only evidence that the government introduced against the defendant was police reports containing statements that the two women had made to the authorities.\textsuperscript{113} The defendant was found guilty on the basis of this evidence alone.\textsuperscript{114} The ECHR held that, because he had not been able to cross-examine either his wife or his stepdaughter about the only evidence against him, the conviction violated the Convention.\textsuperscript{115} Instead of specifically pointing to the confrontation clause in article 6(3)(d), however, the court justified its decision based on the defendant’s general right to a fair trial as defined in article 6.\textsuperscript{116} The opinion did not proscribe the use of hearsay in all criminal cases, but rather warned that a state could not use hearsay evidence if it deprived the defendant of a fair trial.\textsuperscript{117}

Subsequent cases helped to define, more adequately, situations in which prosecutorial use of hearsay evidence contravened the Convention. In \textit{Barbera v. Spain}, evidence against the defendants included a written statement by their former accomplice, made when he was in police custody, in which he accused the defendants of committing the crime for which they were charged.\textsuperscript{118} Before trial, the witness disappeared and the authorities could not locate him.\textsuperscript{119} The court held that the trial was unfair, primarily because the defendants did not have the opportunity to cross-examine their former accomplice.\textsuperscript{120}

Another case that further clarified the relationship between hearsay and a defendant’s right to a fair trial was \textit{Delta v. France}.\textsuperscript{121} In that case, a robbery victim and her companion failed to appear in court despite having been summoned.\textsuperscript{122} Although they were the only witnesses to the crime, the French courts allowed the police officer who had taken their statements to testify as to what they had told him, and the defendant was found guilty on the basis of that evidence.\textsuperscript{123} Be-

\begin{itemize}
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id. (citing Unterpertinger, 110 Eur. Ct. H.R. (ser. A) at 15, § 33).
\item \textsuperscript{116} See Kirst, supra note 35, at 783.
\item \textsuperscript{117} See id.
\item \textsuperscript{118} Id. (citing Barbera v. Spain, 146 Eur. Ct. H.R. (ser. A) (1989)).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} See id. (citing Barbera, 146 Eur. Ct. H.R. (ser. A) at 37–38, § 89).
\item \textsuperscript{121} See Kirst, supra note 35, at 787 (citing Delta v. France, 191 Eur. Ct. H.R. (ser. A) at 2 (1990)).
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id. (citing Delta, 191 Eur. Ct. H.R. (ser. A) at 9–10, §§ 18–21).
\end{itemize}
cause the defendant never had an opportunity to examine either of the witnesses, the ECHR held that his trial had been unfair.  

The *Ludi v. Switzerland* case demonstrates that a trial can be unfair even if the hearsay evidence in question was not the only probative evidence against the defendant.  

In *Ludi*, a drug trafficking case, the evidence against the defendant included several telephone calls that the government had intercepted, statements by the defendant after he was arrested, statements by co-defendants, and a report by an undercover officer. The officer refused to testify in order to preserve his anonymity, and the defendant argued that his absence rendered the trial unfair. The ECHR agreed, finding that the fact the officer was unavailable for cross-examination, despite the existence of alternative ways to testify that would have preserved his anonymity, made the trial unfair.

Although it would seem from the preceding cases that the ECHR believes that violations of the Convention exist whenever hearsay evidence is the significant basis upon which the government relied to convict the defendants, other cases indicate that this assumption is incorrect. For example, in *Isgro v. Italy*, the court found that the prosecution’s use of a hearsay accusation by an alleged accomplice did not create an unfair trial for several reasons: (1) the accomplice was not anonymous; (2) the defendant did confront the accomplice at a hearing before the investigating judge at which each accused the other of lying; (3) the defendant did not contest the impartiality of the investigating judge; and (4) the accusation by the accomplice was not the only evidence.

Likewise, in *Asch v. Austria*, a case with facts almost identical to *Unterpertinger*, the ECHR held that the Austrian government had not violated the Convention. The court distinguished *Unterpertinger* by noting that the government’s use of the victim’s statement to police was not the only evidence upon which the trial court relied to convict the defendant.

124 See id.
127 Id. (citing Ludi, 238 Eur. Ct. H.R. at 21, § 49).
128 Id.
The ECHR attempted to clarify its policy on hearsay and the Convention in *Ferrantelli v. Italy*. The defendants in the case had been convicted of murdering two police officers. The evidence against the defendants included their, and an alleged accomplice’s, confessions to police. In the alleged co-conspirator’s first confession, he stated that he had committed the murders with the two defendants. The next day, he retracted that statement and instead said that he acted alone. Before the defendants’ trial, however, the accomplice committed suicide. The Italian court used the first confession, in which the accomplice had identified the defendants as culpable, to convict the defendants.

The ECHR found that the use of the original confession did not violate the Convention. The court noted that all evidence “must normally be produced in the presence of the accused at a public hearing,” and that generally the prosecution must give the defendant an opportunity to question a witness at some point. Recognizing that these rules are not absolutes, however, the ECHR held that Italy had not contravened the Convention. As Professor Kirst notes, however, the court “did not describe the standard by which it would determine when it was permissible for a court to deviate from the rules that should normally be followed.”

Although the ECHR has not, as of yet, made that standard explicit, two more recent cases help to shed light on the subject. In *Verdam v. Netherlands*, the defendant had been convicted of raping several women. The prosecution could not locate two of the women for testimony at trial, so instead it used the statements the women had given to police. Defense counsel had been present for only one of

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134 Id.
135 Id. supra note 35, at 790.
136 Id. at 790–91.
138 Id. at 791.
139 Id. at 791.
140 Id.
143 Id. (citing Ferrantelli, 1996-III Eur. Ct. at 951, § 53).
144 Id.
146 Kirst, supra note 35, at 796.
the statements. The ECHR insinuated that, if the conviction had been based “to a decisive extent” on hearsay statements, the court would find the trial to be unfair. On the contrary, the ECHR also found that a trial court could rely on evidence that corroborated the truth of hearsay statements. If such corroborating evidence existed, use of the hearsay evidence would not offend the Convention.

The fact that the prosecution had no corroborating evidence against the defendant in Luca v. Italy rendered his trial unfair according to the court. In that case, the defendant was convicted of drug crimes because a man who the authorities caught possessing cocaine indicated that the defendant had sold it to him. The informant had refused to testify at trial in order to protect himself from self-incrimination. The ECHR held that, because the conviction was based solely upon the statements of a person whom the defendant was never able to question, the trial had been unfair.

D. The Commission’s Analysis of the ECHR Hearsay Cases

When the Law Commission for England and Wales wrote its report and drafted its model statute on hearsay in criminal cases, the Draft Bill that Parliament substantially copied when drafting the CJA, the Commission was keenly aware that the United Kingdom was a signatory to the Convention and, as such, had agreed to honor the mandates of the treaty. In its report, after examining the ECHR cases discussed above, the Commission came to several conclusions about the relationship between hearsay and the right to a fair trial as guaranteed by the Convention.

First, the Commission analyzed the use of the word “witness” in article 6(3)(d), which states that every defendant in a criminal case has the right “to examine or have examined witnesses against him.” On the basis of its analysis of ECHR cases, the Commission concluded

147 Id. (citing Verdam, No. 35253/97, Eur. Ct. H.R. (1999)).
148 Id. (citing Verdam, No. 35253/97, Eur. Ct. H.R. (1999)).
149 See id.
150 Id. (citing Verdam, No. 35253/97, Eur. Ct. H.R. (1999)).
151 Kirst, supra note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
153 Id.
155 See LAW COMMISSION FOR ENGLAND AND WALES, supra note 2, at 56.
156 See id. at 57–66.
157 European Convention on Human Rights, supra note 6, art. 6(3)(d), 213 U.N.T.S. at 228.
that “the word ‘witness’ goes beyond its usual meaning (to an English lawyer) of someone who attends the trial to give oral evidence.” 158 Instead, the meaning of “witness” includes a person who has made a statement to police that the prosecution then attempts to enter into evidence at trial. 159 Yet the Commission also noted that all of the people whom the ECHR has defined as “witnesses” were those who have voluntarily given information to criminal justice officials. 160 In other words, just because a witness testifying at trial repeats the comments of a third person not present at trial to prove the truth of the comments, there is no guarantee that the Convention affords the defendant the right to question the absent individual. 161 Even though an English court would certainly identify such testimony as hearsay, the ECHR would not necessarily consider the third person to be a “witness” under article 6(3)(d) of the Convention, thus eradicating the possibility of a violation under that section of the treaty. 162

After concluding that the ECHR cases clearly indicate that the defendant does not have an inherent right to question witnesses against him at trial, 163 the Commission considered a more difficult question—is it ever possible to enter the statement of an absent witness into evidence if the defendant has never had the opportunity to question that witness? 164 The Commission posited that two interpretations are possible. 165 A literal reading of the Convention suggests a negative answer, because article 6(3) explicitly states that every criminal defendant has the rights listed in subparts (a) through (e), which include the right “to examine or have examined witnesses against him.” 166 Unterpertinger took this strict constructionist view. 167

The Commission, however, adopted an alternative theory, namely that “the rights expressly conferred by article 6(3) are not absolute rights: they are merely factors which have to be considered in deciding a broader question—‘Did the defendant receive a fair trial as required

158 Law Commission for England and Wales, supra note 2, at 57.
159 Id. & n.7.
160 Id. at 57.
161 Id.
162 Id.
163 Law Commission for England and Wales, supra note 2, at 59 & n.16.
164 Id. at 59–60.
165 Id. at 60.
166 European Convention on Human Rights, supra note 6, art. 6(3), 213 U.N.T.S. at 228; Law Commission for England and Wales, supra note 2, at 60.
by article 6(1)?’”\(^{168}\) In the Commission’s view, a trial in which the statements of a witness whom the defendant has never questioned are admitted is not unfair under the Convention, provided that two conditions are met: (1) it must be impossible to produce the witness for questioning; and, more importantly, (2) other evidence must support any hearsay statements used against the defendant.\(^{169}\) Several ECHR decisions, according to the Commission, indicated that the more liberal approach to interpretation of article 6(3) had become the law.\(^{170}\)

Despite its rejection of the strict constructionist view, the Commission’s original conclusion regarding the relationship between hearsay evidence and article 6(3) was that hearsay, unsupported by any other probative evidence, could not be sufficient proof of any element of a crime.\(^{171}\) But many jurists and scholars criticized that position, arguing that the ECHR did not consider the existence of supporting evidence to be a necessary component of a fair trial.\(^{172}\) Moreover, other pundits worried that disagreement over what actually constitutes “supporting evidence” would produce endless litigation and a great deal of confusion.\(^{173}\)

Having accepted this criticism as valid, the Commission chose not to include a supporting evidence requirement into the Draft Bill.\(^{174}\) Instead, the Commission included a “catch-all” provision, article 14, which, in their opinion, would ensure the statute’s compliance with the Convention.\(^{175}\) Parliament apparently agreed with the Commission’s analysis and, in lieu of implementing a corroborating evidence requirement, included the majority of the language from article 14 in section 125 of the CJA.\(^{176}\) Section 125 states that if

(a) the case against the accused is based wholly or partly on a statement not made in oral evidence in the proceedings, and

\(^{168}\) Id. at 61.

\(^{169}\) Id.

\(^{170}\) See id. & n.26.

\(^{171}\) See id. at 66.

\(^{172}\) Law Commission for England and Wales, supra note 2, at 66.

\(^{173}\) Id. at 66–67.

\(^{174}\) See id. at 67.

\(^{175}\) See id. at 67–68.

\(^{176}\) Compare Criminal Justice Act, 2003, c. 44 (Eng.), § 125, with Law Commission for England and Wales, supra note 2, at app. A § 14(1).
safe, 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.\textsuperscript{177}

Parliament most likely concurred with the view of the Commission that article 14, acting together with other safeguards such as the prohibition against the admissibility of anonymous witnesses’ hearsay statements, would provide “adequate protection for the accused” under the Convention.\textsuperscript{178}

III. Analysis

A. Gaps Between the Commission’s Analysis and ECHR Case Law

Certainly, the Commission put forth a good faith effort to ensure that its Draft Bill complied with the Convention and, specifically, article 6(3).\textsuperscript{179} Yet the Commission itself recognized that the ECHR cases are somewhat inconsistent and often difficult to reconcile with one another.\textsuperscript{180} Furthermore, the ECHR tends to view the Convention as an ambulatory document; therefore, the court’s interpretation of the treaty has changed—and will continue to change—over time.\textsuperscript{181} Because the court takes such a flexible approach, it is nearly impossible to predict whether particular governmental practices of the member countries will, in fact, offend the Convention.\textsuperscript{182}

Even so, the ECHR case law strongly supports many of the Commission’s conclusions regarding the hearsay jurisprudence of the court. For example, it is clear that the Convention does not require all witnesses against a defendant to testify at trial in order for their statements to be admissible.\textsuperscript{183} In addition, the court will not find that a trial was unfair simply because hearsay evidence was most likely a major factor in the defendant’s conviction.\textsuperscript{184} Although the cases do not necessarily draw a firm line between fair and unfair use of hearsay, the Commission was correct in stating that, in order to violate the Con-

\textsuperscript{177} Criminal Justice Act, 2003, c. 44 (Eng), § 125.
\textsuperscript{178} LAW COMMISSION FOR ENGLAND AND WALES, supra note 2, at 67.
\textsuperscript{179} See id. at 56–68.
\textsuperscript{180} See id. at 56.
\textsuperscript{181} Id.
\textsuperscript{182} See id.
\textsuperscript{183} See LAW COMMISSION FOR ENGLAND AND WALES, supra note 2, at 59 & n.16.
vention, the evidence must be so untrustworthy that the fundamental fairness of the trial is in question.\footnote{See id. at 782–83.}

In contrast, the reasoning of the Commission was deficient when it dealt with the question of convictions premised upon hearsay statements alone. The ECHR has held repeatedly that a trial is unfair if the defendant’s conviction was predicated on an uncorroborated hearsay statement and the defendant never had the opportunity to question the statement’s author.\footnote{See id. at 782 (citing Unterpertinger, 110 Eur. Ct. H.R. (ser. A) (1986)); id. at 783 (citing Barbera, 146 Eur. Ct. H.R. (ser. A) (1989)); id. at 787 (citing Delta, 191 Eur. Ct. H.R. (ser. A) (1990)).} In all fairness to the Commission, however, the ECHR did not decide \textit{Luca}, the case which clarified the need for corroboration in cases based solely on hearsay, until after the Commission had written its report.\footnote{See id. at 796–97 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)) (making explicit the formerly implicit requirement that corroborating evidence is necessary when the conviction is dependent upon an untested hearsay statement).} Parliament, on the other hand, enacted the CJA after the \textit{Luca} decision had been handed down, so the legislators should have been on notice that the Convention mandates a corroboration requirement.\footnote{See id.}

Thus, the CJA contains several provisions that may contravene article 6(3) of the Convention. One such area of concern is section 116, which makes previous statements of a witness admissible if that witness is unavailable at trial.\footnote{See Criminal Justice Act 2003, c. 44 (Eng.), § 116.} This provision seems to suggest that the recorded statements of an unavailable witness, such as a deceased person, would be admissible against the defendant, regardless of whether she ever had the opportunity to question that witness.\footnote{See id. § 116(1)–(2) (a).} Because analysis of the ECHR cases shows that convictions based upon hearsay evidence alone are inherently unfair if the defendant never had the opportunity to question the author of the hearsay statements, the court would almost certainly find a conviction based on such evidence to be unfair.\footnote{See Kirst, \textit{supra} note 35, at 782 (citing Unterpertinger, 110 Eur. Ct. H.R. (ser. A) (1986)); id. at 783 (citing Barbera, 146 Eur. Ct. H.R. (ser. A) (1989)); id. at 787 (citing Delta, 191 Eur. Ct. H.R. (ser. A) (1990)).}

Although Parliament did not heed the teachings of \textit{Luca} when it created the CJA, it did include section 125 in an attempt to anticipate
future developments in the interpretation of the Convention.\textsuperscript{192} Despite the fact that Parliament was incorrect in its assumptions about the relationship between hearsay and corroborating evidence, there is a possibility that section 125 renders that issue moot.\textsuperscript{193}

**B. Section 125 and the Luca Corroboration Requirement**

Section 125 requires the judge to direct a verdict for the defendant when his conviction could only be based upon hearsay evidence that is “so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.”\textsuperscript{194} Thus, in order to comply with the Convention as interpreted in \textit{Luca}, English and Welsh appellate judges simply could hold that any uncorroborated hearsay is inherently unconvincing.\textsuperscript{195} Perhaps this is self-evident; after all, it is difficult to imagine that English or Welsh judges, historically distrustful of hearsay, would be willing to convict someone of a crime based on hearsay evidence alone.\textsuperscript{196}

However, the Commission did not believe that every case in which a conviction was premised upon uncorroborated hearsay would be inherently “unconvincing.”\textsuperscript{197} The Commission gave an example in which uncorroborated hearsay could, in fact, be quite convincing, stating that “the hearsay statement might consist of a statement in a business document prepared by somebody with substantial knowledge of the matters set out, and yet be incapable of any form of corroboration save for a statement by the writer’s superior that the writer was a reliable and conscientious employee.”\textsuperscript{198} The Commission’s desire to allow such a case to proceed to the factfinder persuaded the Commission to reject a corroboration requirement.\textsuperscript{199} Instead, the Commission wrote section 14, hoping that it would ensure the Draft Bill’s compliance with the Convention without forcing judges to direct a verdict in all cases based on uncorroborated hearsay.\textsuperscript{200} Therefore, in the Commission’s view, section 14, as written, allows judges to submit

\textsuperscript{192} See \textsc{Law Commission for England and Wales}, supra note 2, at 67–68 (discussing the rationale for creating section 14 of the Draft Bill, which is virtually identical to section 125).

\textsuperscript{193} See \textsc{Criminal Justice Act 2003, c. 44 (Eng.)}, § 125.

\textsuperscript{194} Id. § 125(1)(b).

\textsuperscript{195} See id.; \textsc{Kirst}, supra note 35, at 797 (citing \textit{Luca}, 2001-II Eur. Ct. H.R. 167 (2001)).

\textsuperscript{196} See \textsc{Criminal Justice Act 2003, c. 44 (Eng.)}, § 125.

\textsuperscript{197} See \textsc{Law Commission for England and Wales}, supra note 2, at 67.

\textsuperscript{198} Id.

\textsuperscript{199} See id.

\textsuperscript{200} See id. at 67; see also id. at app. A § 14(1).
some cases based solely upon uncorroborated hearsay to the factfinder.\textsuperscript{201} It stands to reason that, since section 125 of the CJA is almost an exact duplication of section 14, Parliament intended section 125 to be interpreted similarly.\textsuperscript{202}

Thus, judicial scrutiny of section 125 presents a significant problem. In Parliament’s view, section 125 does not apply to some cases based on uncorroborated hearsay,\textsuperscript{203} but the ECHR has held that convictions based upon hearsay are unfair unless there is corroborating evidence.\textsuperscript{204} Therefore, if appellate judges were to construe the statute in accordance with the drafters’ intent, it would contravene the Convention.\textsuperscript{205} Even so, such an interpretation may never arise, because the United Kingdom has incorporated the Convention into its own domestic law.\textsuperscript{206} As such, it would seem that the ECHR case law, and 

\textit{Luca} specifically, would bind the English and Welsh appellate courts, thereby requiring them to hold that the evidence in cases based upon uncorroborated hearsay is \textit{per se} “unconvincing.”\textsuperscript{207}

On the other hand, if Parliament were simply to amend section 125, there would be no possibility of judicial interpretation issues.\textsuperscript{208} Parliament would only have to add a short statement within the section, clarifying the corroboration requirement.\textsuperscript{209} It should amend section 125(1)(b) by splitting it into two subparts.\textsuperscript{210} The amended section 14(1)(b) should read, “(i) the statement is not corroborated by other evidence, or (ii) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the accused, his conviction of the offence would be unsafe.”\textsuperscript{211}

This amendment would guarantee that English and Welsh judges direct verdicts for defendants when their convictions could only be

\begin{footnotes}
\footnote{201}{See Law Commission for England and Wales, \textit{supra} note 2, at 67–68, app. A § 14(1).}
\footnote{202}{See Criminal Justice Act, 2003, c. 44 (Eng.), § 125.}
\footnote{203}{See id.}
\footnote{204}{See Kirst, \textit{supra} note 35, at 797 (citing \textit{Luca}, 2001-II Eur. Ct. H.R. 167 (2001)).}
\footnote{206}{See Human Rights Act, 1998, c. 42 (Eng.), §§ 1–4; Council of Europe, \textit{supra} note 40.}
\footnote{207}{See Kirst, \textit{supra} note 35, at 797 (citing \textit{Luca}, 2001-II Eur. Ct. H.R. 167 (2001)).}
\footnote{208}{See Criminal Justice Act, 2003, c. 44 (Eng.), § 125.}
\footnote{209}{See id.}
\footnote{210}{See Criminal Justice Act 2003, c. 44 (Eng.), § 125(1)(b).}
\end{footnotes}
the result of uncorroborated hearsay evidence. The amendment would also retain Parliament’s prohibition against convictions premised upon “unconvincing” hearsay. Furthermore, as amended, the statutory construction would clarify any possible ambiguity about whether uncorroborated hearsay is necessarily “unconvincing.” Because the amended statute would state explicitly that a case based upon uncorroborated hearsay always requires a directed verdict, judges would not have to decide the question.

Certainly, this proposed amendment would not render the CJA completely free of issues of interpretation. The corroboration requirement that the ECHR announced in Luca raises many complex problems. Most notably, it is impossible to know, at this point, how much evidence the prosecution must produce in order to satisfy the corroboration requirement in cases premised upon hearsay. Furthermore, considering the instability of ECHR precedent, it is difficult to determine whether the corroboration requirement will survive. Based on the cases available currently, however, the CJA contravenes the Convention in its present form. Therefore, either Parliament or the appellate bench must take measures, such as those noted above, to make it conform with the treaty.

**Conclusion**

In creating its Draft Bill, the Commission took reasonable steps to ensure that the statute would comply with the European Convention on Human Rights. However, the Commission’s theory that a conviction based solely upon uncorroborated hearsay would not violate the Convention proved to be incorrect. Further, by including substantial portions of the Draft Bill in the CJA, Parliament enacted a law that contravenes the treaty. Although section 125 of the Act contains lan-

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212 See id. § 125(1).
213 See id.
214 See id.
215 See Criminal Justice Act 2003, c. 44 (Eng.), § 125(1).
216 See generally id. (a lengthy, complex statute).
217 See Kirst, supra note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
218 See Law Commission for England and Wales, supra note 2, at 67 (making a similar argument when arguing against the efficacy of a corroboration requirement).
219 See id. at 56.
220 Compare id. at 67–68, with Kirst, supra note 35, at 797 (citing Luca, 2001-II Eur. Ct. H.R. 167 (2001)).
221 See European Convention on Human Rights, supra note 6, art. 46, 213 U.N.T.S. at 246.
guage that the Commission assumed would prevent contravention of the Convention, that provision is inadequate because it does not explicitly contain a corroboration requirement. Therefore, Parliament should amend section 125 of the CJA so that the statute recognizes the need for corroborating evidence in criminal cases based solely upon hearsay statements.