Chapter 11: Hearsay in criminal cases

Cases where a witness is unavailable

Relevant person cannot be found even though such steps as are reasonably practicable to take to find him have been taken

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In *R v Kiziltan* [2017] EWCA Crim 1461, the judge decided that time should not be allowed to find a witness who had failed to attend as expected. The Court of Appeal held that the judge's decision was finely balanced in the context of a short trial and should not be criticised, even though another judge might perhaps have allowed the prosecution another day. However, having reached the decision that no more time should be allowed, the judge then took the wrong approach. His 'next step' was to decide whether it was in the interests of justice to admit the evidence, applying s 114(1)(d) and the factors in s 114(2); but the correct approach is to consider whether the evidence fell to be excluded under s 78 of the Police and Criminal Evidence Act 1984, by reference to the factors in s 114(2). Had the correct approach been followed, the evidence would have been excluded.

The requirement of leave where the maker of the statement does not give oral evidence through fear

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In deciding whether it is in the interests of justice to grant leave to admit the statement of a witness who is absent on grounds of fear, material considerations include 'the circumstances of the making of the statement, the interest or disinterest of the maker,… supporting evidence, what is known about the reliability of the maker and the means of testing such reliability [and] any other relevant circumstance' (see *R v Millar* [2017] EWCA Crim 639).