

# **Blind Shots at a Hidden Target: Witness Anonymity**

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## **A. INTRODUCTION**

1. The issues engaged by the debate about the circumstances in which it may be permissible for the Crown to secure a conviction based on the evidence of an anonymous witness are numerous, complex and controversial.
2. The issues include:
  - the need to secure evidence in serious cases in which witnesses are increasingly unwilling to provide evidence for fear of reprisals;
  - the need to protect witnesses' rights to security and privacy;
  - the disadvantages faced by the defendant and whether these disadvantages render the process so unfair as to deny the accused a fair trial;
  - the extent to which a defendant can claim a right to "confront" his accuser;
  - whether a process can be designed to ensure sufficient safeguards for the rights of the defendant and the witness.

### **The witness' perspective**

3. There seems to be little doubt that witness intimidation is a major problem facing the criminal justice system. Research reports show that even 10 years ago (1998 British Crime Survey) the risk of intimidation was about eight per cent for all victims covered by the survey but increased to 15 per cent for victims who may be considered to be in a situation that gives rise to the potential for intimidation.<sup>1</sup>

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<sup>1</sup> R Tarling et al *Victim and Witness Intimidation: Findings from the British Crime Survey* (2000). The 2000 and 2002 Witness Satisfaction Surveys revealed that over half of witnesses were concerned or worried about attending court. Their primary concerns were about seeing the defendant and more general pre-court nerves. Maynard, W.

4. With violent crime and gun related crime those figures are unlikely to be representative. In the Court of Appeal in the *Davis* appeal, the President of the Queen's Bench Division went so far as to say that anonymity for witnesses in serious cases was necessary because "... these gun carrying criminals are challenging the rule of law itself."<sup>2</sup>

5. His lordship explained:

8. These cases are not untypical. There is compelling evidence of an alarming increase in gun-related crime (see *Crime in England and Wales 2003/2004: Supplementary Volume 1; Homicide and gun crime*, published in January 2005). In an earlier case which we were asked to consider in argument, *R v Bola*, unreported, 18 June 2003, Hughes J summarised the evidence then before him in a case where a woman was summarily executed in a drug related feud.

"Since April 2002 there have been no less than thirty seven people injured on the streets of Nottingham in shooting incidents. Not domestic incidents, on the streets. Three of them have been fatalities..... The fear of gun crime has an adverse effect on the public who live in the areas of Nottingham where such things occur and particularly has had a considerable impact on the ability of the police to investigate crime. He says, and I have absolutely no reason to doubt, indeed I am confident that he is right that the experience of the police is that after an incident of this kind witnesses are frequently content to come confidentially to the investigators to tell them what they know, what they saw, to give them leads and help about what the background may be and sometimes to name names, but that such witnesses are to a very large extent frightened to be identified as co-operating with the police and unwell, as a result, to give evidence. They fear similar incidents, and they fear retribution, either from those whom they accuse, or, more generally, from those who take the stance that co-operation with the authorities is anathema...the evidence...is entirely consonant with the experience of anybody who has practiced in the criminal courts in the last few years. It describes a situation which all of us know obtains not even or mainly in Nottingham but in several major cities in England..... "

These observations are entirely consistent with the judicial experience of each member of the court.

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(1994). *Witness Intimidation: Strategies for Prevention*. Police Research Group Crime Detection and Prevention Series Paper 55. London: Home Office.

<sup>2</sup> [10].

9. In the Davis appeal there is undisputed evidence from a detective officer who has specialised in murder investigations for the last seven years, and in particular, gun related violence. He said:

"Most people opt not to co-operate and do not get involved. Doors are not opened, arranged meetings result in a witness not turning up, telephone messages go unanswered and messages left at home addresses/work, although discrete are ignored. This is not a problem that exists on an occasional basis.....it is a problem that exists in practically every investigation in one way or another. Such problems exist on a daily basis. I have spoken to witnesses about a reluctance to give evidence. The common factor between all of them is fear.

They are in fear of their lives and that of their families and friends. There is a very real danger to such persons of death or serious injury, either to prevent them from giving evidence, or to punish them for giving evidence and to send a warning to those who may be thinking of assisting the police. This risk I know and the witnesses know, is not necessarily at the hands of the defendants themselves, but at the hands of the associates of the defendant. If the defendant is in custody, it is often the associates who are the physical threat.

In many but not all cases, the witness knows of the defendant and their associates. They know they have easy access to firearms and the "ease" with which they are prepared to use them."

10. In summary, quite apart from the ghastly callousness involved in the use of firearms to kill, and the devastation suffered by the families of the deceased, it is not an exaggeration to point out that, whether they are aware of it or not, these gun carrying criminals are challenging the rule of law itself. One common feature of both these cases, and many others like them, is the absence of any or any significant attempt at concealment. People are gunned down in busy crowded areas. Although the offences are witnessed, those who use their guns expect to escape justice. They anticipate that the guns which have been used to kill will also serve to silence, blind and deafen witnesses. Without witnesses, justices cannot be done. "

6. The Criminal Justice Act 2003 has made significant inroads into the hearsay rule so that more evidence can be read from absent witnesses including those who are in fear. The court must be satisfied that it is in the interests of justice to admit hearsay from a

frightened witness under the Criminal Justice Act 2003 s 116(2)(e). The witness is only spared the need to attend the trial and face the accused and his associates. There is no protection of his identity.

7. Recent years have also seen a greater awareness of the difficulties facing a witness giving evidence in proceedings and special measures to alleviate the stress of giving evidence are more commonplace. These do nothing to protect the witness or his family outside the courtroom.
8. The problem is a serious one. The more serious the crime the more likely we are to need the witness to provide important information and yet the more serious is likely to be the risk of perceived risk of intimidation. Witnesses need protecting to respect their human rights including the right to life (Article 2) the right to security and liberty (Article 5) and the right to respect for private life (Article 8).
9. Certain categories of crime are only likely to be effectively policed with the use of undercover officers and they will in turn depend on the protection of anonymity at trial. These cases in which officers of the State provide anonymous evidence might be distinguishable from those involving members of the public as witnesses.

### **The defendant**

10. Denying the defendant the opportunity to know the identity of the person accusing him hinders his defence.
  - a. It is impossible to investigate the credibility of the witness;
  - b. The defendant has no opportunity to assess the demeanour of the witness;
  - c. The defendant's relationship with his counsel may be put under strain;
  - d. The defendant's cross-examination is less likely to be effective;
  - e. The defendant's ability to examine witnesses is unequal to the Crown's;
  - f. There is a potential conflict with Article 6(3)(d) of the ECHR;
  - g. There is no opportunity to confront the witnesses;
  - h. The defendant is more reliant than normal on the disclosure process;
  - i. The defendant is worse off than if hearsay is adduced against him;
  - j. The jury are likely to treat the use of anonymous witness evidence as implicit evidence that the accused is violent and/or responsible for intimidation.
11. Not all of these claims will be regarded as compelling arguments against the use of anonymity.

### *Credibility*

- a. It is impossible to investigate the credibility of the witness – but is the credibility of the witness always important? Can cross examination expose the insincerity of the witness? The defendant has the opportunity to cross examine on the detail of the incident allegedly witnessed and to probe the answers given. What the inability to credibility presents is an opportunity for the defendants rivals or enemies to create evidence against him impunity. The importance of this issue is emphasised in the 2008 Act section 5.

### *Demeanour*

- b. The defendant has no opportunity to assess the demeanour of the witness – how important is it that the defendant sees the witness? There is an argument that the appearance and unconscious behaviour of a witness while giving evidence assists in evaluating evidence and triggering deeper cross examination.<sup>3</sup> But, we have long accepted that the defendant can be present out of sight of the witness.<sup>4</sup> Counsel for the defendant might be able to see the witness and tailor cross examination accordingly. Is the demeanour of a witness a true measure of reliability or honesty?

### *Client counsel relations*

- c. The defendant's relationship with his counsel may be put under strain if counsel is able to see the witness and the defendant is prohibited from doing so. This may lead counsel to decline to see the witness to avoid a compromising situation. Problems might also arise if D recognises W in the course of the trial and reveals that fact to counsel.

### *Cross examination*

- d. The defendant's cross-examination is less likely to be effective; - this is based on the argument that the defendant will be unable to explore the motives of the witness for lying or perhaps more worryingly embellishing the account that he has provided. Is it inevitable that the witness will change his story once he knows he will have anonymity, even if just to ensure he is not recognisable? There is clearly a difference between the opportunity to ask questions and to cross examine effectively.

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<sup>3</sup> See Law Commission Report No 245 Hearsay (1997) para 3.9.

<sup>4</sup> *Smellie* (1914) Cr App R

### *Inequality of arms*

- e. The defendant's ability to examine witnesses is unequal to the Crown's. This appears to be in direct conflict with Article 6(3)(d).

### *Article 6*

- f. There is a conflict with Article 6(3)(d) of the ECHR. That provides: the right  
**6(3)(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**

The right to cross examine has to be adequately respected by allowing the accused an opportunity to question a witness *effectively*.

### *Confrontation*

- g. No right to confrontation. This is a vague concept in English and ECHR jurisprudence. The ECtHR has on occasion recognised the right as in *Saidi v France*.<sup>5</sup> The Attorney General's Guidelines under the 2008 Act refer to confrontation as an important aspect of the right to be confronted by and challenge those who accused the defendant. The Sixth amendment to the US Constitution guarantees such a right: the accused shall enjoy the right to be confronted with the witnesses against him. The closest that the ECHR gets is Article 6(3)(d). Academic commentators and the US courts have identified numerous elements to the "right".<sup>6</sup> Including right to have witnesses against you take the oath; a right to observe the demeanour of the witness; a right to have the witness "eyeball" the defendant<sup>7</sup> and most importantly, a right to cross examine witnesses. As Scalia J emphasised in *Crawford v Washington*<sup>8</sup>

"it commands not that evidence be reliable but that reliability be assessed in a particular manner; by testing in the crucible of cross examination."

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<sup>5</sup> (1994) 17 EHRR 251, at para 44.

<sup>6</sup> See in particular Richard Friedman "Thoughts from Across the Water on Hearsay and Confrontation" [1998] Crim LR 697. Friedman argues that "a person may not offer testimony against a criminal defendant unless it is given under oath face to face with the accused and subject to cross examination" p 697. See also W O'Brien "the right of confrontation US and European Perspectives" (2005) 121 LQR 481.

<sup>7</sup> This is the element which is usually colourfully explained by reference to the trial of Sir Walter Raleigh where, facing conviction on the evidence of co-accused Lord Cobham, the defendant asked simply for Cobham to be brought "let him speak it. call my accuser before my face and I have done". See *Howell's State Trials*.

<sup>8</sup> 124 S Ct 1354 (2004).

Is the confrontation really an important safeguard? It assumes that it is “always more difficult to tell a lie about a person to his face than behind his back.”<sup>9</sup>

*Disclosure*

- h. The defendant is more reliant than normal on the disclosure process. The defendant is restricted in what he can ask in cross examination regarding the credibility and the motives or potential motives a witness might have for lying. He is entirely dependent on the Crown having met its disclosure obligations with scrupulous care.

*Worse than hearsay*

- i. The defendant is worse off than if hearsay is adduced against him. With a hearsay statement from a witness which is read because the witness is absent (whether through fear or otherwise) the defendant at least knows who is making the allegations and can therefore investigate the reasons he might have for lying. He is unable to cross examine the missing witness but can challenge credibility and consistency under s 124 of the Criminal Justice Act 2003. Is D better off knowing who is making the allegation but not being able to cross examine about it or not knowing who is making the allegation but being able to cross examine about the incident in full?

*Jury bias*

- j. The jury are likely to treat the use of anonymous witness evidence as implicit evidence that the accused is violent and/or responsible for intimidation. Arguably that concern can be met by suitable judicial direction in the same way that potential prejudice in trials with armed police protection for jurors etc is dealt with.

**Finding a fair procedure**

- 12. At common law, the use of anonymous witnesses has been regarded as a source of injustice for centuries. In recent decades the Courts developed a discretion to allow for anonymity measures to be granted to witnesses
  - a. The use of pseudonyms
  - b. The use of screens

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<sup>9</sup> Scalia J in *Coy v Iowa* 108 S Ct 2798 (1988).

- c. Voice modulation
  - d. Clearing the courtroom
  - e. Imposing reporting restrictions
  - f. Preventing cross examination likely to lead to revelation of the identity.
13. In one of the first reported cases in recent times the Divisional Court sanctioned the use of such drastic measures in the interests of justice: *R v Watford Magistrates Court exp Lenman*<sup>10</sup>. The defendants were charged with violent disorder under section 2 of the Public Order Act 1986 following disorder in Watford where the group attacked 4 people, stabbing one seriously. The witnesses who identified the defendants feared for their personal safety and so their identities were withheld. The witnesses were referred to by the names of colours and at committal proceedings they gave evidence behind screens with their voices disguised. The magistrate ruled that the witnesses should retain their anonymity, but that the legal representatives should be able to see the witnesses.
14. In deciding whether a case is made out for withholding the identity of a witness or taking particular precautions were set out by Lord Lane C.J. in *R. v. X,Y,Z*.<sup>11</sup> That case had decided that the trial judge had a duty to see that justice was done, in the sense that the system operated fairly not only to the defendant but also to the prosecution and witnesses and that sometimes a judge had to make a decision as to where the balance of fairness lay.
15. It was held that the decision in *R v DJX*<sup>12</sup> was a statement of general principle. “If a magistrate was satisfied that there was a real risk to the administration of justice, because a witness on reasonable grounds feared for his safety if his identity were disclosed, it was entirely within the powers of the magistrate to take reasonable steps to protect and reassure the witness so that the witness was not deterred from coming forward to give evidence. If, however, the rights of an accused, particularly his ability to prepare and conduct his defence were thereby prejudiced, justice required the court to balance the prejudice to him and the interests of justice. It might well be that on substantial grounds being shown justice would require the witness's identity to be disclosed.”
16. The Divisional Court in *Lenman* refused to interfere with the decision unless it was shown that it was Wednesbury unreasonable.

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<sup>10</sup> [1993] Crim LR 388.

<sup>11</sup> 1989) 91 Cr.App.R. 36.

<sup>12</sup> (1989) 91 Cr.App.R. 36.

17. The Court of Appeal very soon added its endorsement to the procedure. In *R v Taylor*<sup>13</sup> T was charged with C with murder and perverting the course of justice. The prosecution case was that either C or T shot D in a pub removed his body, dismembered it and attempted dispose of it. A schoolgirl, known as Miss A, was one of a group outside the pub who saw the incident. Miss A's mother made a statement expressing fear of reprisals against her daughter and the family if Miss A was identified. At trial, Miss A gave evidence behind a screen. Counsel could see her, the defendant could see her on a tv screen. Her name and address were not revealed. In her evidence the other girls she was with were not identified to avoid the danger that she be identified through them. On appeal against conviction, it was argued that Miss A's identity should have been revealed.
18. The Court of Appeal dismissed the appeal. The right of the accused to see and to know the identity of his accusers should only be denied in rare or exceptional circumstances. Whether the exception was made out was pre-eminently a matter for the discretion of the judge. The factors which are or may be relevant are as follows:
- (a) first and foremost, there must be real grounds for being fearful of the consequences if the evidence is given and the identity of the witness revealed. In practical terms it may be sufficient to draw a parallel with the provisions of section 23(3)(b) of the Criminal Justice Act 1988 [now s 116 of the CA 2003]. In principle, however, it is not necessary for the witness himself to be fearful. It could be concern expressed by others (as in this case, by Miss A's mother), and the consequences need not be limited to the witness himself, but could include for instance his family.
  - (b) The evidence must be sufficiently relevant and important to make it unfair to compel the prosecution to proceed without it. The greater the importance, the greater potential unfairness to the defendant, and a distinction could be drawn between cases where the creditworthiness of the witness is or is likely to be in issue and others where the issue for the jury is reliability and accuracy.
  - (c) The prosecution must satisfy the court that the creditworthiness of the witness has been fully investigated and disclosed (so far as is consistent with the anonymity sought).
  - (d) The court must be satisfied that no undue prejudice is caused to the defendant, some prejudice being inevitable if the order is made. There may be factors pointing the other way, such as the possibility of the defendants seeing the witness on television screens so

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<sup>13</sup> [1995] Crim LR 253. cf the cases in which the Court had always recognised the defenadnt's need to be able to defend himself : *Agar* (1989) 90 Cr App R 318; *Slowcombe* [1991] Crim LR 198.

that they could be sure it was no-one they recognised and who may have a motive for giving evidence against them.

(e) The court must balance the need for anonymity, including the extent of any necessary protection, such as screens or video cameras, against the unfairness or appearance of unfairness in the particular case.

(3) There was no reason in principle why the same considerations should not apply when the defence sought to call a witness whose identity is not revealed.

19. Thereafter, the practice of anonymizing witnesses was adopted in a wide range of cases and seems not to have been subjected to direct appellate challenge. In *Al Fawwaz*<sup>14</sup> Lord Hutton did suggest that

“the judge has to strike a balance of fairness between the prosecution and the accused in which the importance of the accused knowing the identity of the accuser is a factor of great weight, but I think that in some cases the balance of fairness may come down in favour of the prosecution notwithstanding that the circumstances could not be described as rare and exceptional” [para 86]

20. The process was approved by the Interdepartmental Committee on Vulnerable and Intimidated witnesses *Speaking up For Justice*<sup>15</sup>

## **2. THE DECISION IN DAVIS**

21. Davis was charged with the murders of AK and WM who had been present at a party in Hackney, on New Years Day 2002. Davis, admitted being present at the party but claimed to have left before the shooting. Three prosecution witnesses identified Davis as the gunman. To protect their identity, the judge ordered that they would be allowed to give evidence under pseudonyms; any details which might identify them were to be withheld from Davis and his legal advisers; and they could not be asked any questions which might lead to their identification; they would be allowed to give evidence from behind screens and their voices disguised electronically. D suspected that the evidence was procured by an ex girlfriend.

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<sup>14</sup> [2002] 1 All ER 545.

<sup>15</sup> (1998) Home Office para 8.32.

## **The Court of Appeal**

22. The Court of Appeal rejected Davis's appeal that these protective measures were in conflict with the common law and inconsistent with Article 6 of the ECHR. There was clear jurisdiction at common law to admit incriminating evidence given against the defendant by anonymous witnesses. The Court of Appeal was satisfied that the counter-balancing procedures were sufficient to ensure a fair trial.

## **The House of Lords<sup>16</sup>**

23. On 18<sup>th</sup> June the House of Lords handed down their unanimous decision overturning the Court of Appeal. For many this was a surprising decision. It was expected that the House might acknowledge the need to develop the common law to meet the threat posed by violent crime.

24. The House of Lords held that the procedure developed at common law to receive anonymous witness evidence infringed the defendant's right to a fair trial where his conviction was based solely or decisively on such evidence.<sup>17</sup> It was unfair, as Lord Bingham put it, to require a defendant to take **blind shots at a hidden target**. Unless he could know the identity of the witness giving crucial evidence against him, how could he cross examine effectively that witness?

25. Within days multi-handed murder trials had collapsed<sup>18</sup> there were reports that nearly 600 current trials were in jeopardy and the government swiftly announced new legislative proposals. By 21<sup>st</sup> July the Criminal Evidence (Witness Anonymity) Act 2008 was passed, in force and the Attorney General had produced complementary guidelines on the use of anonymous witnesses: *The Prosecutor's Role in Applications for Witness Anonymity Orders*.<sup>19</sup>

## **The arguments in the House of Lords.**

### *Common law development to meet pressing need*

25. The primary argument advanced by the Crown in support of common law development was that the problem of witness intimidation is real and prevalent. In this case, as in many others, witnesses would not give evidence unless their identity was withheld from the

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<sup>16</sup> [2008] UKHL 36.

<sup>17</sup> David Howarth, writing in Archbold News (2008) on the new Act suggests that Parliament misunderstood the decision in the House of Lords by construing it as placing a complete ban at common law on anonymous witnesses.

<sup>18</sup> *The Times* June 25<sup>th</sup> pp 6-7.

<sup>19</sup> These are available from <http://www.attorneygeneral.gov.uk/attachments/>

defence. If they would not give evidence, dangerous criminals would walk free and both society and the administration of justice would suffer.

26. The House acknowledged the prevalence of the problem, but pointed to the fact that it was centuries old and universal. The House noted that even in relation to witness intimidation in Northern Ireland at the height of the troubles, Lord Diplock's Report (Legal Procedures to Deal with Terrorist Activities) had felt unable to recommend that legislation should allow for anonymous witness evidence to be received.<sup>20</sup> It was unanimously accepted that it was for Parliament and not the courts to meet these needs by making inroads into the rights of the defendant.<sup>21</sup>

27. Other nations have introduced legislation, and in some, the courts have been prepared to take responsibility.<sup>22</sup>

*Public justice not absolute*

28. A second line of argument for the Crown related to the qualifications to the principle of open justice. If, in order to do justice, some adaptation of ordinary procedure is called for it should be made so long as the overall fairness of the trial is not compromised. This was recognized in the seminal case of *Scott v Scott*:<sup>23</sup> the "paramount object must always be to do justice".

29. The House of Lords had little difficulty in rejecting that argument, treating *Scott v Scott* as an authority dealing only with the administration of justice in public and the circumstances in which information might be withheld from the public, not the accused.<sup>24</sup>

*Established common law practice*

30. Predictably, the Crown also relied on the recent case law, particularly *R v Taylor and Crabb* (above) supporting the adoption of protective measures including anonymity. The House examined this series of cases in which incremental steps towards the position in the trial in *Davis* had been adopted.<sup>25</sup> These were found usually to involve witnesses who were known to the accused or to include a facility by which the accused could watch the witness giving evidence by video link so the issue of anonymity did not arise in full since

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<sup>20</sup> [6].

<sup>21</sup> Lord Bingham [27]; Lord Rodger [45].

<sup>22</sup> See J Anderson [1985] Crim LR 363 on the Danish experience.

<sup>23</sup> [1913] AC 417, 437.

<sup>24</sup> Lord Bingham at [11].

<sup>25</sup> See Lord Bingham [20].

the defendant had sufficient knowledge of the witness to investigate his or her credibility, consistency, motives for lying etc.

31. Had the common law crept too far by a series of individually innocuous steps? Was the common law system being over used and abused by routine applicaitons?
32. The House held, unanimously, that in cases in which anonymity was preserved in full and the defendant had no opportunity to investigate the credibility of the witness against him, the defendant's right to a fair trial was infringed if the evidence was the sole or decisive evidence against him.

*No worse than hearsay*

33. It might be argued that the defendant is not as disadvantaged by evidence received from a frightened witness who testifies anonymously as by a fearful witness whose hearsay statement is read under the Criminal Justice Act 2003. With an anonymous witness D1 can cross examine about the detail of the evidence being given, but because of the anonymity cannot probe fully the possible bases for lying or embellishing the account. With a hearsay statement from a named witness, D2 cannot cross examine at all, but can investigate any reason that witness might have for lying and can adduce previous inconsistent statements made by the witness. Is D1 necessarily less well protected than D2?
34. The House was clearly unimpressed by this line of reasoning. Lord Bingham and Lord Carswell referred to the difficulties a defendant would face, drawing on the judgment of Ackermann J in *S v Leepile*.<sup>26</sup> that there can be no investigation into the witness' background to ascertain whether he has a general reputation for untruthfulness, or has made previous inconsistent statements; it would make it more difficult to make enquiries to establish that the witness was absent from where he claimed to be mentioned by him. Significantly, it was recognised that it would heighten the anonymous witness' "sense of impregnability and increase the temptation to falsify or exaggerate."<sup>27</sup>

*ECHR*

35. The Strasbourg jurisprudence was also examined in detail by the House of Lords, principally in the speech of Lord Mance. It was accepted that the European Court had not gone as far as to proscribe anonymous evidence in all circumstances. The ECHR case law

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<sup>26</sup> 1986 (4) SA 187 p 189.

<sup>27</sup> [9].

did however make clear that a conviction should not be based solely or to a decisive extent on anonymous statements.<sup>28</sup>

36. In *Davis*, the anonymous witness evidence was the sole or decisive basis for conviction. In addition, the anonymity prevented effective cross-examination. Davis' defence, which went to the probity and credibility of the witnesses, was gravely impeded by his counsel's inability to explore who the witnesses were and the nature of their contact with Davis.

37. The ECtHR has taken a range of views on the anonymity and Article 6 issue.

38. In *Kostovski v Netherlands*<sup>29</sup>

41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.

42. Yet such an opportunity was not afforded to the applicant in the present case, although there could be no doubt that he desired to challenge and question the anonymous persons involved. Not only were the latter not heard at the trials but also their declarations were taken, whether by the police or the examining magistrate, in the absence of Mr. Kostovski and his counsel. Accordingly, at no stage could they be questioned directly by him or on his behalf.

It is true that the defence was able, before both the Utrecht District Court and the Amsterdam Court of Appeal, to question one of the police officers and both of the examining magistrates who had taken the declarations. It was also able, but as regards only one of the anonymous persons, to submit written questions to him/her indirectly through the examining magistrate. However, the nature and scope of the questions it could put in either of these ways was considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved.

The latter feature of the case compounded the difficulties facing the applicant. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious

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<sup>28</sup> *Doorson v Netherlands* (1996) 22 EHRR 330, *Kostovski v Netherlands* ((1990) 12 EHRR 434 and *Ludi v Switzerland* (1993) 15 EHRR 173.

<sup>29</sup> (1990) 12 EHRR 434.

39. In *Doorson v Netherlands*<sup>30</sup>

70. It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.

39. In *Van Mechlen v Netherlands*<sup>31</sup> the Court stated:

58. Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.

59. In the present case, the police officers in question were in a separate room with the investigating judge, from which the accused and even their counsel were excluded. All communication was via a sound link. The defence was thus not only unaware of the identity of the police witnesses but were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability.

60. It has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered. In the absence of any further information, the Court cannot find that the operational needs of the police provide sufficient justification.

*Disclosure*

40. The Crown sought to emphasize the level of protection afforded to the defendant by the disclosure regime, and in particular the prosecutor's obligation to disclose material known to the prosecutor as damaging to an unidentified witness, or of a previous inconsistent statement made by such a witness even in a case in which anonymity was preserved. It was pointed out that the Crown had in that case duly delivered a disclosure package to the defence, giving details of witnesses' records and previous convictions.

41. The House rejected this as a sufficient safeguard, holding that the "fairness of a trial should not largely depend on the diligent performance of their duties by the prosecuting

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<sup>30</sup> (1996) 22 EHRR 330, para 70.

<sup>31</sup> (1998) 25 EHRR 647.

authorities. All are familiar with notorious cases in which wrongful convictions have resulted from police malpractice, rare though such misconduct is.”<sup>32</sup>

### **The aftermath of Davis**

42. The CPS revealed that when *Davis* was decided around 580 cases had anonymity orders operating (290 involved test purchases by undercover officers, 40 involved other police witnesses and 50 involved members of the public).<sup>33</sup> This list included: cases charged and awaiting trial; currently being tried; convicted but not yet sentenced; and convicted and sentenced. No wonder then that the government responded with legislation placed before Parliament within a matter of days.
43. Despite dealing with issues of enormous gravity, the Bill received only one day of debate in the House of Commons. It had cross-party support in both Houses.

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<sup>32</sup> [31].

<sup>33</sup> Jack Straw, Hansard, HC, 8<sup>th</sup> July col 1304.

### 3. THE CRIMINAL EVIDENCE (WITNESS ANONYMITY) ACT 2008

44. Controversy still rages over not only the inroads it makes into fundamental fair trial guarantees but as to the over-hasty manner of its enactment. One of its most important provisions may therefore be s.14, providing for its expiration on 31 December 2009. The government promises more carefully considered legislation in the Law Reform, Victims and Witnesses Bill in the forthcoming Parliamentary session.<sup>34</sup>

#### *Commencement and Jurisdiction*

45. By s. 9, the Act applies to any criminal proceedings in England and Wales and Northern Ireland (s. 15), where the trial or hearing begins on or after 21 July 2008 or which are on-going, but not concluded on that date. Section 10 makes transitional provision for cases which are on-going and in which an anonymity order had been made at common law prior to 21<sup>st</sup> July.

#### *The new scheme for anonymous witnesses*

46. The Act abolishes the common-law rules by which a court could order the withholding of a witness' identity (s. 1(2)), but does not affect any common law rules relating to public interest immunity (s.1(3)), nor to the power to conduct hearings *in camera*. Section 1 introduces "witness anonymity orders" - for which both prosecution and defence may apply (s.3). Orders are available in "criminal proceedings" in the Crown Court, Court of Appeal Criminal Division and the Magistrates' Court, although orders in the latter are expected to be very rare (the government retained their availability principally because of drug prosecutions involving test purchases tried there). No specific offence is created for breach of an order, but such conduct constitutes a contempt of court.

#### *What measures are available?*

47. Section 2 empowers the judge to make "witness anonymity orders". By s 2(2) these include measures for securing the withholding of the witness's name and other identifying details from disclosure, permitting the use of a pseudonym; preventing questions that might lead to the witness' identification; screening and voice

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<sup>34</sup> See also the Ministry of Justice Circular 2008/2 and the Home Office Explanatory Notes. See also the New Zealand Law Commission Discussion Paper [http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_43\\_83\\_PP29.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_43_83_PP29.pdf)

modulation. These are merely examples of the types of measures that may be taken, drawing on experience from the orders made under the common law pre-*Davis* and listed by Lord Carswell in his speech in *Davis*.

48. The court can make *any* order it considers “appropriate” to ensure anonymity. The Act has no part to play where W is known to D but W seeks to avoid his or her name being revealed to the public. There is a wide judicial discretion.
49. Significantly, s.2(4) prevents an order being made which screens a witness from “the judge or other members of the court (if any); the jury (if there is one); or any interpreter or other person appointed by the court to assist the witness. In addition, if voice modulation is used, the witness’s natural voice must still be heard by these individuals. As at common law, the judge and jury see and hear the witness in his or her natural state maximising their opportunity to evaluate the witness’ demeanour.”<sup>35</sup> The Act is silent as to what the legal representatives may see: presumably the trial judge will allow this if the advocate chooses (in *Davis*, counsel had declined the opportunity to see the witness his client was forbidden from seeing).
50. Although there is no specific power of appeal against the making of an order, the powers under s.58 of the Criminal Justice Act 2003 for prosecution interlocutory appeals apply, but the defence will only have an interlocutory appeal in preparatory hearings. Under s.6, an order under s. 2 may be varied, further varied, or discharged where it appears “appropriate” to the court that made it. This may be on the court’s own motion or on application by any party if a material change in circumstances has occurred since the order was made or varied.

#### *The application procedure*

51. Section 3, which regulates the application procedure, remained one of the most controversial clauses in the Bill, despite government amendments inserted to provide a more detailed system. These procedural provisions were inserted to meet the ECHR concerns as noted by Lord Mace.<sup>36</sup>

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<sup>35</sup> See the importance attached to this in the ICTY in *Tadic* First Instance (Witness Protection) (1995) UN.

<sup>36</sup> *Davis* [79].

52. On an application by the prosecutor, the identity of the witness may be withheld from any other party to the proceedings before and during the application, but must (unless the court directs otherwise) be revealed to the court: s. 3(2). There may be cases involving national security where even the court does not insist on knowing the identity of the witness, although the witness will be heard and seen by the judge in any event (see s. 2(4) above).

53. All applications made by the prosecution will be governed by the Attorney General's Guidelines and DPP's Guidance. The *AG's Guidelines* B4 requires that an application will only be authorised at 'an appropriately high level'

The role of the prosecutor as an independent and impartial minister of justice is of paramount importance. Applications should only be authorised by prosecutors at an appropriately senior level within the prosecuting authority.

54. Under DPP's guidance this must be specifically by the Head of Complex Casework Unit or Head of HQ Casework Division (*DPP's Guidance* paragraph 33).

55. In contrast, on application by a defendant, the identity of the witness must be revealed to the court *and the prosecutor*, but not to any other defendant if there is such: s.3(3). In the process of making an application, the identity and information that might enable identification of the witness can be withheld in accordance with the scope of these obligations.

56. The Attorney General's Guidelines provide that an application may only be made where there are genuine grounds to believe that the court would not otherwise hear evidence which it is in the interests of justice for it to hear.

57. Concerns were raised by opposition parties that the inequality between the procedure for the defence and the Crown gave rise to unfairness and potential conflict with the ECHR, in particular, Article 6(3)(d) which provides that the defendant has the right to examine witnesses against him "under the same conditions as witnesses" on his behalf. In practical terms, the difficulty is that unless D1 reveals to the Crown the identity of the witness he wishes to call but keep anonymous, the Crown cannot

investigate that witness and fulfil its disclosure obligations to D2.

58. Numerous amendments were tabled (unsuccessfully) in attempts to insert a requirement that independent counsel would be instructed in all cases as in New Zealand to assist the court and protect the defendant's interests. Even in *Davis* itself independent counsel was appointed. Is the Act less protective than the common law? One powerful argument for independent counsel is that knowledge that such independent examination will occur may deter prosecution and investigative agencies from being too profligate in promising anonymity to potential witnesses. Such a provision would be welcome also for increasing likely compliance with the ECHR. It gained support from the Joint Parliamentary Committee on Human Rights. The Attorney General's Guidelines for prosecutors acknowledge that special counsel may be applied for in the exceptional circumstances identified by the House in *H and C*.<sup>37</sup> The government has promised to revisit the issue in the Law Reform, Victims and Witnesses Bill.

59. Will special counsel be relied on heavily in the early days of the Act where trial judges are treading carefully? Will it be possible to keep special counsel to "exceptional cases"?

60. The opportunity for *ex parte* procedures is governed by ss. 3(6) and (7). The Explanatory Notes to the Act describe these as reflecting "existing practice" for *ex parte* prosecution applications "with the defence able to make representations later at an *inter partes* hearing (with the prosecution present and possibly other defendants)". In contrast, it is "expected that defence applications will be permitted *ex parte* other defendants but will always be made in the presence of the prosecution."

#### *Necessary conditions for an anonymity order*

61. The heart of the new scheme lies in ss. 4 and 5. An order may only be made subject to the three conditions in s 4. The court must be "satisfied" of each of these conditions in every case, but this is not a formal requirement that the matter be proved to the criminal standard, and presumably the judge may be satisfied by evidence which

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<sup>37</sup> [2004] UKHL 3. and see *Malik v Manchester CC* [2008] EWHC 1362.

would be inadmissible at trial. Even if all three conditions are met there is no obligation to grant an anonymity order.

62. By subs (3), “Condition A” is that the measures are necessary:

*(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or*

*(b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise). ...*

63. The court must make a finding of fact under Condition A and therefore the party seeking the order must bear a burden of proof. Can the trial judge make the decision on the basis of PII material alone which the defence has no opportunity to challenge or know about? <sup>38</sup>

64. Although the court must be “satisfied” that the measures are “necessary” to protect the witness, it can be argued that Condition A will be too readily met. Under s.4(3)(b), it is sufficient that the court is satisfied that there will be real harm to the public interest even if no need for protection of a person or property from harm is shown. It may be enough that an undercover officer claims simply that without anonymity he will not be able to work in that role again. Will blanket applications be made in respect of certain types of officer etc?

65. Under s. 4(3)(a), the level of physical harm against which the witness or another is protected is not specified. Serious doubts might also be raised as to whether it can be “necessary”, as s.4(3)(a) contemplates, to grant anonymity merely to prevent serious damage to property (without serious injury). Subsection 6 provides further guidance requiring the court:

*“to have regard (in particular) to any reasonable fear on the part of the witness—*

*(a) that the witness or another person would suffer death or injury, or*

*(b) that there would be serious damage to property,*

*if the witness were to be identified.*

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<sup>38</sup> Cf *Ali* [2008] EWCA Crim 146 in relation to hearsay under s 114.

66. That does not impose formal requirements that the witness fears death or serious injury before Condition A is satisfied. Many witnesses in a murder or major drug trial will experience fear of violent reprisals: will the judge accept them as “reasonable” fears? Will the courts take a rigorous enough approach to Condition A to limit anonymity to exceptional cases?
67. The necessity requirement is clearly an objective test, and the requirement of reasonable fear is a mixed subjective objective test: W must be in fear and have reasonable grounds for it.
68. By s. 4(4), “Condition B” is that:
- “having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial.”*
69. This is a provision designed to ensure ECHR compatibility. The government has in effect passed the buck to the trial judge to ensure Article 6 fairness by leaving it to his discretion on a case by case basis. The provision could have been drafted more strictly since the judge is obliged in every case to be “satisfied” only that the measure would be “consistent” with D having a fair trial. Could a distinction be drawn between an order “consistent with” and an order not in contravention of?
70. The Attorney General’s guidelines are explicit that anonymity orders are not necessarily contrary to the ECHR.<sup>39</sup>
71. Having regard to this provision, some might question why the House of Lords denounced the common law approach endorsed by the Court of Appeal. Would any of the trial judges who made orders pre-*Davis* really have done so if they were not sure the defendant could have a fair trial?

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<sup>39</sup> See also K Starmer *European Human Rights Law* (1999) p 290 – “the convention does not rule out the use of anonymous witnesses”

72. By subsection (5), “Condition C” is that

*it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that—*

*(a) it is important that the witness should testify, and*

*(b) the witness would not testify if the order were not made.*

73. The court must be satisfied of the explicit causal element – “but for” these measures the witness would not (not “might” not) testify. The fact that “it is important that the witness should testify” is not strictly the same as the evidence the witness can provide being important, but it is likely to be treated as such by the courts. What of a police officer – can a police officer refuse to give evidence or does he have a duty to do so?

74. How will the court determine the interests of justice? Is that to be left as an open textured discretion? What factors will be relevant? How much other evidence? The significance of the evidence? The gravity of the offence?

75. In considering whether Conditions A-C are met, the court *must* have regard to the considerations set out in s.5, to any other matters which the court considers relevant and to whether alternatives to anonymity may be sufficient. Given their centrality to the scheme it is astonishing that they received no scrutiny in the House of Commons. By s.5(2) the considerations are:

*(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;*

76. This is nothing more than a reminder to the court of the general right to know the identity of the accuser.

*(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;*

77. This is a very important element of the decision. The inability to challenge the credit of the witness is one of the main reasons that the cross examination is less effective in an anonymous witness case.

***(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;***

78. The specific obligation in s.5(2)(c) to have regard to whether the witness' evidence is the sole or decisive evidence implicating D was introduced by the Government to meet the specific concerns raised by the House of Lords in *Davis* about ECHR compatibility. It does not go as far as some amendments tabled in Parliament which proposed a formal corroboration requirement. This is only a consideration not a condition, but is the \$64m question. Can a witness anonymity order be made if the witness will provide the sole or decisive evidence? What does sole or decisive mean? Presumably it means that there would be a successful submission of no case to answer without it? Note that it has been held that there can be a safe conviction on hearsay evidence alone,<sup>40</sup> although the Joint Parliamentary Committee doubted the legitimacy of that approach when scrutinising the Criminal Justice Bill.

79. . As Lord Mance pointed out in *Davis*, the European Court has yet to finalise its views on anonymous evidence generally: it is not proscribed in all circumstances, but his lordship's view (and that of Lord Bingham) was that

“It is considerably less certain... that there is an absolute requirement that anonymous testimony should not be the sole or decisive evidence, or whether the extent to which such testimony is decisive may be no more than a very important factor to balance in the scales. I doubt whether the Strasbourg Court has said the last word about this.”<sup>41</sup>

69. The AG Guidelines state:

Anonymous witness testimony is not necessarily incompatible with Article 6, even when it is the sole or decisive evidence against the accused. But whether the measures used to allow a witness to give evidence anonymously in any particular case would make the trial unfair has to be evaluated with care on the facts of each case.

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<sup>40</sup> *R v Cole and Keet* [2008] 1 Cr App R 5.

<sup>41</sup> [89].

*(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;*

80. The judge can assess this in light of the disclosure material he has seen in respect of the witness.

*(e) whether there is any<sup>42</sup> reason to believe that the witness—*

*(i) has a tendency to be dishonest, or*

*(ii) has any motive to be dishonest in the circumstances of the case,*

*having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;*

81. Is the requirement really one that there must “any reasonable grounds for a belief”? The Court might also consider eg whether W has any interest in the outcome of the case, whether W was known to the defendant before the incident in question, whether there is any independent evidence supporting W’s account.

*(f) whether it would be reasonably practicable to protect the witness’s identity by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.*

82. Section 5 is looser than the New Zealand legislation which requires the court also to have regard to (i) the gravity of the offence and (ii) the principle that witness anonymity is an exceptional measure.

83. Assessing the factors that are listed will be no easy task and necessarily involves speculation. The court must have “regard to” (not be “satisfied” of) this non-

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<sup>42</sup> Emphasis added

exhaustive list of factors. In the context of hearsay under s 114(2) of the Criminal Justice Act 2003, the test of “having regard to” has been held not to require the trial judge to investigate all the factors in every case: *Taylor*.<sup>43</sup>

84. As emphasised in *Davis*, the significant impediment in not knowing the identity of the witness is that the party cannot challenge his or her credibility either generally or in relation to the matters in issue. The section seeks to underline the significance of credibility in paras. (b) and (e). Recognition of their heightened importance was demonstrated by the fact that amendments were tabled (albeit unsuccessfully) to elevate para (e) from a “mere” factor to be considered in s. 5, to an essential condition under s. 4. Para (e) may well prove troublesome in practice. If D does not know who the witness is, it is difficult for him to provide the court with material or even arguments as to why that witness does have a tendency to be dishonest etc. Once again, the defendant is at the mercy of the disclosure regime and the ability of the judge to anticipate from material disclosed any likely motives the witness may have.

85. In sum, in sections 4 and 5 the government has sought to build into the process many safeguards, drawing on the practice at common law, the suggestions in Lord Carswell’s speech in the House of Lords and the New Zealand Act. Although not incorporating every one of the possible safeguards, it is submitted that the party seeking the grant of an order under the Act will face no less onerous an obligation than at common law.

#### *Jury warnings*

86. On a trial on indictment the judge must warn appropriately to prevent prejudice to the defendant from the anonymity order being followed. Presumably JSB specimens will be created.

#### *Appeals and safety of convictions in pre-Act cases*

87. As noted, although far from routine, witness anonymity had become more commonplace until *Davis* in the House of Lords, and numerous convictions for

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<sup>43</sup> [2006][EWCA Crim 000.

serious offences, commonly murder, were founded on such evidence: the CPS estimated around 200 convictions were still within the time to appeal when *Davis* was decided. Section 11 seeks to pre-empt automatic appeals in those cases. The fact that anonymous witness evidence was received at trial under the now discredited common law procedure cannot itself render a resulting conviction unsafe. Convictions must be quashed only if the appellant appears not have had a fair trial. In addressing alleged unfairness owing to the reception of anonymous witness evidence at trial, the appeal court must consider whether an order could (not “would”) have been made under the Act.

#### 4. CONCLUSION

88. In *Davis*, the House of Lords refused to develop the common law even in the face of the chronic problem of witness intimidation (which has doubled in a decade), openly inviting Parliament to respond. Parliament responded swiftly. The interesting question is: What prevents an order under the Act from also being held to infringe the defendant’s right to a fair trial? The answer seems to be that although the House of Lords was not prepared to countenance the common law producing convictions based on evidence from anonymous witnesses, the judicial committee did not exclude the possibility that a conviction secured in reliance on such evidence would be unfair or unsafe if sanctioned by Parliament. The difference, and what is likely to insulate anonymity orders under the Act from successful challenge, is simply that “Parliament has spoken”.

89. Nevertheless, it seems inevitable that challenges will be made. Two issues are worth bearing in mind in this regard. First, whether the evidence of the anonymous witness is the sole of decisive evidence is likely to be a crucial factor in determining the fairness of trial. Secondly, as Lord Carswell noted,<sup>44</sup> a defendant may find it difficult to argue his trial was unfair if the reason for the witnesses giving anonymous evidence was because he or his associates had threatened them. Before defence advocates get too optimistic about the likely success of any ECHR arguments, it is worth noting that the Joint Parliamentary Committee on Human Rights reported that in its view

“the Bill is broadly to be welcomed from a human rights perspective....[ and agreed] with the analysis in the Bill's Explanatory Notes that the Bill is compatible with

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<sup>44</sup> [60-61].

Article 6 ECHR, on the basis of the express protection for the right to a fair trial and the discretion left to the trial judge to determine that issue.”<sup>45</sup>

90. Practitioners must now grapple with this temporary emergency provision. Will it prove to be “the most serious single assault on liberty in living memory ...result[ing] in thousands of unfair trials”?<sup>46</sup> Ironically, the answer lies in the hands of the same judges from whom the House of Lords removed the powers in *Davis* and crucially with the prosecutors who must act with scrupulous fairness in their role as “ministers of justice” in such cases.

91. Several parliamentarians quoted Lord Denning: “in the very pursuit of justice our keenness may outrun our sureness and we may trip and fall”.<sup>47</sup> Since the Act has such a short life expectancy, in this instance it may be a temporary slip. The Lord Chancellor gave assurances that the judiciary will be encouraged to monitor and record all witness anonymity orders so that lessons may be learned for the 2009 Bill.

END

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<sup>45</sup> Joint Committee on Human Rights *Twenty-Sixth Report* (2008) para 1.9.

<sup>46</sup> Geoffrey Robertson QC, *The Guardian*, 8<sup>th</sup> July.

<sup>47</sup> *Jones v National Coal Board* [1957] 2 QB 55 (at 64-65).