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## Can fair trial rights be balanced against other interests?

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### Summary

The right to a fair trial and due process is found in all relevant human rights instruments. Its fundamental value has never been doubted but controversy often flows from the question of what fairness demands in a given situation and the relevance of interests that are extraneous to or in competition with those of the right holder. The House of Lords decision in *R v Davis* regarding the fairness of anonymous witness testimony and the emergency legislative response brings into sharp focus the lack of consensus over the essential constituent elements of a fair trial. The statutory code for witness anonymisation is predicated on a requirement that the measures must be consistent with the provision of a fair trial while at the same time potentially permitting a conviction to be based decisively on anonymous testimony. The history and context of this legislation demonstrates the delicate balancing act that legislature, executive and judiciary must perform when attempting to protect the rights of the accused whilst neither emasculating the ability of the criminal justice system to bring serious offenders to justice nor exposing witnesses either to the risks of intimidation or to the potentially life changing consequences of witness protection schemes.

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## The nature of fair trial rights

Article 10 of the Universal Declaration of Human Rights provides

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

Article 11(1) provides:

“Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

These principles of a fair trial are of crucial importance in that they underpin rights infrastructures and enable citizens to secure remedies before domestic tribunals. They have been expanded and implemented in all human rights instruments since including Article 14 of the ICCPR and Article 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR).

The right to a fair trial is deemed to be an absolute right but this does not mean that competing interests are of no relevance. On the contrary, although the right itself is said to be absolute, the question of what the right requires is something that can properly take into account the wider interests of justice and the community. The case of *R v Davis* [2008] UKHL 36 in the House of Lords and the subsequent domestic law reform illustrates the nature of the fair trial right and reveal the delicate balancing act to be performed in the face of apparent conflict between an accused’s right to a fair trial and vulnerable witnesses’ rights to protection by the court.

### The House of Lords decision in *R v Davis*

The case arose in the context of Article 6(3)(d) of the ECHR which provides that everyone charged with a criminal offence will have the right “(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 accused was charged with murder. The trial judge had imposed a number of protective measures in relation to three identification witnesses who feared for their lives if they testified against the accused. These measures essentially comprised permitting the use of pseudonyms, withholding addresses, personal details and

identifying particulars from the defence, preventing defence counsel from asking questions that might identify the witnesses, permitting the witnesses to give evidence behind screens such that they could not be seen by the accused and mechanically distorting their voices such that only the judge and jury could hear their natural voices. These measures had been imposed both in order to ensure the witnesses' safety and in order to persuade the witnesses to testify. The accused's counsel was not prevented from seeing the witnesses but declined to do so upon the basis that this would have been incompatible with his duty to his client.

The accused was convicted. His appeal to the Court of Appeal was dismissed but he brought a successful appeal to the House of Lords. Their Lordships recognised that the general common law principle was that the accused was entitled to be confronted by his accusers, the accused thus being enabled to challenge their evidence via cross-examination. Their Lordships accepted that whilst there were exceptions to this principle in the form of exceptions to the rule against hearsay, these hearsay exceptions (unlike the kind of protective measures that the judge had imposed in *Davis*) did not permit the evidence of a witness to be adduced where the identity of the witness had not been disclosed to the accused.

As to the relevance of competing interests in the context of Article 6 of the ECHR, their Lordships recognised that the defendant's rights were not the only considerations in resolving the requirements of fairness:

“In appropriate cases, principles of a fair trial require that the interests of the defence are balanced against those of witnesses or victims called upon to testify, in particular where life, liberty or security of person are at stake, or interests generally within the ambit of Art. 8 of the Convention.” *PS v Germany* (2001) 36 EHRR 1139

Having considered the jurisprudence of the European Court of Human Rights, their Lordships thought the matter was one that had not been finally resolved by the Strasbourg Court. They acknowledged the recurring notion that convictions should not be based solely or decisively on anonymous testimony but observed that there was no complete bar on anonymous witnesses. Indeed their Lordships were not certain that there was an absolute requirement that the accused should never be convicted solely or decisively on the anonymous testimony of a witness who was available for cross-examination. Rather, it may be that the extent to which such testimony was the sole or decisive evidence against the accused was a very important factor for the court to consider when determining whether the proceedings as a whole were fair. As Lord Mance put it the Convention case law may suggest that “the extent of any handicap and the extent to which anonymous evidence is decisive and not separate, but inter-related, aspects of a single overall question, viz whether the trial was “fair”.” (paragraph 86)

Moreover, Lord Mance regarded the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia as suggesting that there was no absolute requirement that the accused should not be convicted solely or decisively on anonymous testimony: “a flexible approach, free at least of any absolute requirement that anonymous testimony should not be the sole or decisive evidence against a defendant.” (paragraph 95).

Their Lordships held that the protective measures that the judge had imposed in *Davis* had unlawfully hampered the conduct of the accused's defence and had rendered the accused's trial unfair. This was so because the measures had prevented the accused's counsel, when cross-examining the anonymous witnesses, from fully exploring the accused's assertion that his former girlfriend had procured false evidence that he was the murderer.

### **The Criminal Evidence (Witness Anonymity) Act**

Following the decision of the House of Lords in *R v Davis*, the Government rushed the Criminal Evidence (Witness Anonymity) Bill through Parliament with exceptional speed, the justification for the Bill's rapid progress being that in the absence of urgent litigation empowering the courts to make witness anonymity orders, a significant number of criminal trials might have to be abandoned and a large number of appeals against conviction might be secured (Maria Eagle (2008) HC Deb, col 1288, 8 July 2008). In this regard, the Crown Prosecution Service had identified around 580 current cases, including 330 involving undercover police officers, 50 involving members of the public and 200 where the accused had either been convicted but not yet sentenced or where the accused still fell within the 28 day limit for bringing an appeal. (Jack Straw (2008) HC Deb, cols 1304-1305, 8 July 2008).

In the course of the Bill's passage through the House of Commons, the Secretary of State for Justice (Mr Jack Straw (2008) HC Deb cols 1305-1311, 8 July 2008) recognised the importance of anonymising evidence and protecting key witnesses if serious criminals were to be brought to trial. The Secretary of State believed that the Bill would both ensure a fair trial for the accused and ensure that victims and the public were protected, and regarded the Bill as consistent with the European Convention. Indeed, the Secretary of State referred to a good practice guide issued by the United Nations Office on Drugs and Crime, indicating that there was international support for the acceptance of anonymised evidence.

The Criminal Evidence (Witness Anonymity) Act 2008 (the 2008 Act) came into force on the day on which it was passed, namely, July 21st 2008. The exceptionally rapid passage of the Bill through Parliament allowed limited time for debate and thus, a "sunset clause" was included in the Act. This clause (now to be found in the guise of s 14 of the 2008 Act) provides that the power to make witness anonymity orders under the 2008 Act expires on December 31st 2009. Moreover, the Secretary of State gave an undertaking to Parliament that there would be time for additional debate in relation to the provisions of the 2008 Act during the next Parliamentary session when the provisions of that Act are subsumed into future legislation.

### **Statutory anonymity orders**

Essentially, the 2008 Act abolished the common law rules under which the criminal courts could formerly have ordered that a witness's identity was withheld from the defence (s 1(2)) and, in substitution for the former common law regime, empowers the criminal courts to make witness anonymity orders provided that three conditions laid down by s 4 of the Act (which are considered below) are met. Where the court makes an order, s.6 empowers the court to discharge or vary an order either on its own initiative or upon application by a party. S 7 of the 2008 Act requires the judge to give

the jury an appropriate warning to ensure that the making of a witness anonymity order does not prejudice the accused.

#### What kinds of measure may the court require under the 2008 Act?

S 2(1) of the 2008 Act essentially provides that a witness anonymity order is an order requiring such specified measures to be taken concerning a witness's identity as the court considers appropriate for the purpose of ensuring that the witness's identity is not disclosed. S 2(2) indicates that the types of measure that may be required under a witness anonymity order include withholding the witness's name and identifying details and removing them from disclosed materials, the use of a pseudonym, not asking the witness questions that might lead to the witness being identified, screening the witness and modulating the witness's voice. S 2(3) makes clear that these types of measure are not exhaustive, but s 2(4) essentially provides that the witness must always be visible and their natural voice audible to the judge, jury (or magistrates), interpreter or any other person appointed to assist the witness.

It should be noted that s 2(4) does not prevent the screening of the witness or the altering of the witness's voice in respect of the prosecution and defence legal representatives. It seems that the intention of Parliament is that where (in order to avoid a conflict between the duty of defence counsel to their client and the duty of defence counsel not to violate the anonymity of the witness) defence counsel decided that they should be put in the same position as the accused regarding screening and voice modulation, the court may direct that the counsel for the prosecution are also put in the same position as the accused in this regard (Lord Hunt of Kings Heath (2008) HL Deb cols 1110-1111, 15 July 2008).

#### The process of applying for a witness anonymity order

S 3 of the 2008 Act, which concerns the making of an application for a witness anonymity order, provides that such an application may be made either by the prosecution or by the defence.

In the case of a prosecution application, s 3(2) essentially provides that the court must be informed of the witness's identity unless the court directs to the contrary, but that neither the witness's identity nor any information that might enable the witness to be identified need be disclosed either to the accused or to the accused's legal representatives. It appears from the Director of Public Prosecution's Guidance that the prosecution might, occasionally, invite the court to exercise its discretion so as not to be informed of the witness's identity where the witness is either a police officer or is a member of another agency that is responsible for the investigation of criminal offences.

#### The section 4 conditions

Section 4 of the 2008 Act lays down the three conditions (namely, conditions A, B and C), which must be met as conditions precedent to the making of a witness anonymity order. Para I.15.16 of Amendment No. 21 to the Consolidated Criminal Practice Direction (Criminal Proceedings: Witness Anonymity Orders; Forms) [2008] All ER (D) 150 (Aug) provides that the court must test the confidential information that has been served upon it thoroughly in order to be satisfied that the conditions laid down by s 4 of the 2008 Act are met, the court being entitled to ask the applicant to

present the proposed witness for questioning if the court concludes that only in this way can it satisfy itself that a condition or conditions is or are met.

Condition A (laid down by s 4 (3)) essentially requires that the measures that the order specifies must be necessary to protect the witness's safety, to protect the safety of another person, to prevent serious damage to property or to prevent real harm to the public interest (the latter, according to paragraph 36 of the explanatory notes to the 2008 Act, might, for example, include the public interest in under-cover police or security service officers being able to carry out operations in future). In determining, for the purposes of Condition A, whether measures are necessary to protect the safety of a witness or that of another person or to prevent serious damage to property, s 4(6) requires the court to consider any reasonable fears on the part of the witness.

Condition B (laid down by s 4(4)) essentially requires that the taking of the measures that the order specifies must, in the circumstances, be consistent with the provision of a fair trial for the accused. We should pause to note that, at least in principle, this Act of Parliament should be consistent with the accused's rights under Article 6. The explicit precondition that the order is consistent with the right to a fair trial ought to ensure that Convention jurisprudence is followed. Nevertheless, as indicated above, it is not entirely clear what the requirements of the Convention are and there is little doubt that convicted persons will claim that the courts have failed to properly give effect to their rights under Article 6(3)(d).

Finally, Condition C (laid down by s 4(5)) essentially requires that the making of the order must be necessary in the interests of justice by virtue of it appearing to the court both that it is important that the witness testifies and that the witness would not do so if the order was not made.

In *R v Mayers* [2008] EWCA Crim 1418, a five panel Court of Appeal heard the first post 2008 Act appeal. The court emphasised that all three conditions are mandatory and that jurisdiction to make a witness anonymity order does not arise unless all three conditions are met. Their Lordships suggested that it would normally be best to deal with Condition C first, that the court should not make a witness anonymity order if the witness' evidence is not important or if the evidence could be read, dealt with by admissions or by agreed facts and that it must be clear that the witness will not testify if a witness anonymity order is not made. Moreover, their Lordships held that the 2008 Act does not empower the court to make a witness anonymity order where it is not proposed to call the relevant witness, the court not possessing the power to admit hearsay statements made by anonymous witnesses.

The Court of Appeal in *Mayers* held that in order to satisfy the court that Condition A has been met, it is not necessary to establish that the risk to the witness's safety could be attributed to the accused's actions. Their Lordships recognised that different considerations might be relevant where the court was required to consider different categories of witnesses (e.g. the witness might be an adult, a child, a vulnerable witness, a counter-terrorist undercover police officer or an officer of a local authority whose duties included the making of test purchases).

Finally, the Court of Appeal in *Mayers* indicated that before the court can be satisfied that Condition B has been met, it will normally be necessary for the court to address

all of the considerations to which the court is expressly required to have regard by s.5 (see below).

#### The section 5 considerations

S 5 of the 2008 Act requires the court, when deciding whether Conditions A, B and C have been met, to consider the general right of the accused to know the identity of a witness (s 5(2)(a)), the extent to which the witness's credibility would be relevant when assessing the weight of the witness's evidence (s 5(2)(b)), whether the witness's evidence might be the sole or decisive evidence against the accused (s 5(2)(c)), whether the witness's evidence could be properly tested if the witness's identity were not disclosed (s 5(2)(d)), whether (paying particular regard to the witness's previous convictions and the witness's relationship with the accused or the accused's associates) there is any reason to believe that the witness has a tendency or a motive to be dishonest (s 5(2)(e)), whether it would be reasonably practicable to protect the witness' identity by any other means (s 5(2)(f)) and any other matters that the court considers to be relevant (s 5(1)(g)).

The Court of Appeal in *Mayers* indicated that none of the s 5 considerations outweigh the others, they are not exhaustive and none are conclusive as to whether the accused's trial will be fair.

The Court of Appeal regarded the s 5(2)(a) consideration as restating and incorporating into the statutory framework the common law principle that the accused is normally entitled to know the identity of a witness who gives incriminating evidence against him.

Their Lordships in *Mayers* identified a link between the s 5(2)(b),(d) and (e) considerations in that they relate to the weight of the witness's evidence and the process by which the witness's credibility may be verified and tested. Their Lordships emphasised the crucial importance of the process of investigation and disclosure and made clear (at paragraph 21) that the "benchmark against which the disclosure process must be examined" is the accused's defence statement. Thus the defence will need to be proactive if they wish to raise matters that bring into question the credibility of potentially anonymous witnesses.

With regard to the s.5(2)(c) consideration, the Court of Appeal in *Mayers* recognised that whilst this consideration directly addresses the Strasbourg jurisprudence that the House of Lords considered in *Davis*, and whilst it directly impinges on the question whether Condition B has been met, the fact that anonymous evidence is the sole or decisive evidence against the accused is not, in itself, conclusive as, had this been the intention, the s.5(2)(c) consideration would have been included amongst the s.4 conditions. Their Lordships recognised, however, that the greater the number of facts that provide independent support for the evidence of the anonymous witness, the safer it is to admit that evidence. Their Lordships also indicated that the existence and nature of any link between anonymous witnesses should be investigated and questions of collusion or contamination should be addressed.

Finally, in relation to the s 5(2)(f) consideration, it is worth noting that, in *Mayers*, the Court of Appeal (at paragraph 8) indicated that witness anonymity orders are "the special measure of last practicable resort". Their Lordships also recognized, however, that

witness relocation would only be a practicable alternative to a witness anonymity order in extremely rare circumstances, because of its tumultuous interference with witness's private life, and, indeed, that it might violate the witnesses right to respect for their private life under Article 8 if it was effectively imposed upon the witness.

### The role of the prosecutor

The Attorney General's Guidelines (in Part B) emphasise the importance of the role of the prosecutor as an "independent and impartial minister of justice". In particular, the Guidelines indicate that the prosecutor must put before the court any material that tends to undermine the justification for making the and must disclose as much relevant material to the defence as is possible without identifying the witness, including material that could cast doubt on the witness's credibility. The Court of Appeal in *Mayers* indicated that the prosecution's obligations are much more extensive than its ordinary disclosure duties, their Lordships indicating that a detailed investigation into the witness's background will normally be required and that some s.5 considerations, such as possible collusion between anonymous witnesses, should be dealt with in the context of disclosure.

The Director's Guidance provides additional guidance to that provided by the Attorney-General. In particular, the Guidance recognises that where the witness's evidence is the sole or decisive evidence against the accused and the witness's credibility is in issue, it is unlikely that the defence will be able to cross-examine the witness effectively. Thus, the Guidance requires the Crown Prosecutor to consider whether corroborative evidence may be secured which will be sufficient to permit the case to continue in the absence of the witness's evidence and, if the witness's evidence is essential, to ensure that as much corroborative evidence as possible has been obtained in order that, if possible, the witness's evidence is not the sole or decisive evidence against the accused.

### Domestic law implementation of international human rights norms

The 2008 Act was introduced as an emergency response to the *R v Davies* case due to fear that existing trials could collapse and convicted defendants successfully appeal. This itself is a curious situation. The House of Lords did not say that anonymous testimony could never be used either at common law or under human rights law. Rather, their Lordships focused on the need for the rights of the defence to be preserved whenever special measures such as these are implemented. The 2008 Act should be seen as a codification of the *Davies* case as opposed to its statutory repeal. Indeed, the Court of Appeal in *Mayers* (at paragraph 5) stated that, subject to the exceptions that the Act created, it maintained "...the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him..."

It is trite law that it is for the national courts to assess the evidence before them with the supervisory Court's role limited to ascertaining whether the proceedings as a whole were fair (see *Doorson v The Netherlands* 22 EHRR 330). On one level, the supervisory function will be simplified because the Act now requires the domestic courts to explicitly address the factors that impinge on the fairness of the trial. There is one issue that remains elusive and this is the extent to which the Convention permits flexibility as to the use of anonymous testimony. The House of Lords was clearly inclined towards the view that an absolutist position was unlikely to emerge.



## Fairness and the decisiveness of anonymous testimony

The scheme clearly envisages the possibility of an accused being convicted solely or decisively on the basis of anonymous witness testimony. If and when this occurs it is likely that Lord Mance's prophecy at paragraph 89) will be realised: "I doubt whether the Strasbourg Court has said the last word about this." The Court will at that time face the intriguing situation where the domestic courts have applied a statute which clearly requires a fair trial and have explicitly balanced the interests of defendant, witness and justice and concluded that fairness is preserved. The European Court will presumably need to rule finally at that point whether a fair trial can take place when decisive evidence of guilt is raised anonymously.

## Bibliography

The Attorney General's Guidelines on The Prosecutor's Role in Applications for Witness Anonymity Orders [www.attorneygeneral.gov.uk](http://www.attorneygeneral.gov.uk)

The Director's Guidance on Witness Anonymity, issued by the Director of Public Prosecutions in August 2008, [www.cps.gov.uk](http://www.cps.gov.uk)

House of Commons Library Research Paper 08/60, 4 July 2008, Criminal Evidence (Witness Anonymity) Bill, Bill 134 of 2007-08, [www.parliament.uk/commons](http://www.parliament.uk/commons)