HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 36

on appeal from: [2006] EWCA Crim 1155

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R v Davis (Appellant) (On appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

Counsel

Appellants:
Malcolm Swift QC
Susan Rodham

(Susan Rodham)

Respondents:
David Perry QC
Simon Ray

(Instructed by Crown Prosecution Service)

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WEDNESDAY 18 JUNE 2008

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LORD BINGHAM OF CORNHILL

My Lords,

1. At about 9.30 am on New Year's Day 2002, towards the end of an all-night New Year's Eve party held in a flat in Hackney, a shot was fired which killed two men. The appellant Iain Davis was in due course extradited from the United States, indicted on two counts of murder, tried at the Central Criminal Court before His Honour Judge Paget QC and a jury and, on 25 May 2004, convicted on both counts. He appeals to the House against the dismissal of his appeal against conviction by the Court of Appeal Criminal Division on 19 May 2006: [2006] EWCA Crim 1155, [2006] 1 WLR 3130.

2. At trial the appellant admitted that he had been at the party but claimed that he had left before the shooting and denied having been the gunman. Appearances were against him. He had gone to the United States on a false passport shortly after the murders. When questioned by the police after his return to this country he had declined to give any answers. In evidence he had for the first time given details of an alibi, which he had called no further evidence to substantiate. But there was one unusual feature of the trial, which gives rise to the issue in this appeal.

3. Seven witnesses claimed to be in fear for their lives if it became known that they had given evidence against the appellant. Among them were three witnesses, the only witnesses in the case who identified the appellant as the gunman. These claims were investigated and accepted as genuine by the trial judge and the Court of Appeal, and have not been the subject of argument in the House. To ensure the safety of these

three witnesses, and induce them to give evidence, the trial judge made an order to the following effect:

(1) The witnesses were each to give evidence under a pseudonym.

(2) The addresses and personal details, and any particulars which might identify the witnesses, were to be withheld from the appellant and his legal advisers.

(3) The appellant's counsel was permitted to ask the witnesses no question which might enable any of them to be identified.

(4) The witnesses were to give evidence behind screens so that they could be seen by the judge and the jury but not by the appellant.

(5) The witnesses' natural voices were to be heard by the judge and the jury but were to be heard by the appellant and his counsel subject to mechanical distortion so as to prevent recognition by the appellant.

The judge's order did not deny the appellant's counsel, then as now Mr Malcolm Swift QC, the opportunity to see the witnesses as they gave evidence, but Mr Swift regarded it as incompatible with the relationship between counsel and client to receive information which he could not communicate to the appellant in order to obtain instructions, and he accordingly submitted to the restriction imposed on the appellant. It has not been suggested that he should have acted otherwise. Without the evidence of the three witnesses the appellant could not have been convicted.

4. Mr Swift objected to these restrictions at trial, and argued on appeal that they were contrary to the common law of England, inconsistent with article 6(3)(d) of the European Convention on Human Rights and rendered the appellant's trial unfair. For reasons given by the President of the Queen's Bench Division, the Court of Appeal (Sir Igor Judge P, Mitting and Fulford JJ) rejected these submissions. The court certified the following point of law of general public importance as involved in its decision:

> "Is it permissible for a defendant to be convicted where a conviction is based solely or to a decisive extent upon the testimony of one or more anonymous witnesses?"

The appellant's challenge does not, however, rest on the anonymity of the witnesses alone but on the combination of restrictions listed in para 3 above, to which I shall in this opinion, to avoid repetition, refer as "protective measures". It is the lawfulness of the protective measures,

and their effect (if any) on the fairness of the appellant's trial, which must be considered in this appeal.

The common law principle

5. It is a long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence. This principle originated in ancient Rome: see generally *Coy v Iowa* 487 US 1012, 1015 (1988); *Crawford v Washington* 124 S Ct 1354, 1359 (2004); David Lusty, "Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials", 24 *Sydney Law Rev* (2002) 361, 363-364. But in continental Europe the principle was greatly attenuated in early mediaeval times and the procedure of the Inquisition, directed to the extirpation of heresy and the preservation of society, depended heavily on evidence given secretly by anonymous witnesses whom the suspect was denied the opportunity to confront. In England, where proof of crime depended on calling live evidence before a jury to convince it of a defendant's guilt, there was no room for such procedures. But concern as to national security and intimidation of witnesses did lead to reliance on secret, anonymous evidence and evidence not adduced in court, and thus to departures from the rule of confrontation, notably in the Court of Star Chamber and in common law trials for treason, as notoriously at the trial of Sir Walter Raleigh. The Court of Star Chamber, popular at first, came over time to attract the same popular loathing as the Inquisition, its procedures regarded as foreign, cruel, oppressive and unfair. It was promptly abolished by the Long Parliament in 1641, and steps were taken (as, for example, by the statute 13 Car.2 c.1) to bring the procedure of treason trials into line with that required at common law. Thus, in 1720, in a civil case, the court declared in *Duke of Dorset v Girdler* (1720) Prec. Ch. 531-532, 24 ER 238, that

> "the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering of the truth."

The practice of confronting defendants with their accusers so that the latter may be cross-examined and the truth established was recognised by such authorities as Sir Matthew Hale (*The History of the Common*

Law of England (6th ed, 1820, pp 345-346), Blackstone (*Commentaries on the Law of England* (12th ed, 1794, Bk III, p 373) and Bentham (*Rationale of Judicial Evidence* (1827), Vol II, Bk III, pp 404, 408, 423). The latter regarded the cross-examination of adverse witnesses as "the indefeasible right of each party, in all sorts of causes" and criticised inquisitorial procedures practised on the continent of Europe, where evidence was received under a "veil of secrecy" and the door was left "wide open to mendacity, falsehood, and partiality." The common law right to be confronted by one's accusers was included within the colonial constitutions of several North American colonies (among them Massachusetts, New Hampshire, North Carolina, Maryland and Virginia: see *Alvarado v Superior Court of Los Angeles County* 23 Cal 4th 1121, 1137-1140 (2000)) and other states adopted similar declarations at the time of independence. By the sixth amendment to the United States constitution adopted in 1791 it was provided that "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …". The rule has been strictly applied: in *Alford v United States* 282 US 687 (1931) a conviction was quashed where a government witness had been excused from answering a question about where he lived.

6. There have been long-recognised exceptions to the right of confrontation in this country (dying declarations and statements part of the *res gestae* are examples), and further exceptions have been enacted by statute, to which reference will be made below. But there has until recently been no precedent for protective measures of the kind now under consideration, even when the problem of witness intimidation has been extreme. Such was the case in Northern Ireland in 1972 when a commission chaired by Lord Diplock reported on Legal Procedures to Deal with Terrorist Activities there. The commission concluded (Chapter 2, para 7(b)) that the problem of witness intimidation could not be overcome by any changes in the conduct of the trial, the rules of evidence or the onus of proof which it would regard as appropriate to trial by judicial process in a court of law. It considered (chapter 4, para 20) that the minimum requirements for criminal trial by a court of law called for the accused to be informed in detail of the nature of the accusation against him and to examine or have examined witnesses against him. The commission could see no way (*ibid*) of keeping the identity of witnesses secret without gravely handicapping the defence or exposing counsel to a conflict between his duty to his client and a duty to the state inconsistent with the role of the defendant's lawyer in a judicial process. A committee under the chairmanship of Lord Gardiner "to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland", reporting in 1975 (Cmnd. 5847), considered the possibility of measures to conceal the identity of

witnesses but concluded (chapter 2, para 55) that the very serious limitations they would place on effective cross-examination would imperil the whole concept of a fair trial, and the committee regarded this, as the Diplock Commission had done, as a conclusive argument against such measures.

7. As already noted, the right to confrontation, borrowed from the English common law, was adopted in the United States as a constitutional right. As such it has been described as "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal" (*Pointer v Texas* 380 US 400, 405 (1965)) and as one "of the fundamental guarantees of life and liberty" (*Kirby v United States* 174 US 47, 55 (1899)). The practical significance of this right was explained in a majority opinion of the Supreme Court in *Smith v Illinois* 390 US 129, 131 (1968) (footnotes omitted):

> "In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

8. In other countries influenced by the common law tradition, the right to confrontation has not achieved constitutional protection but has been treated as an important right. In a majority decision of the Court of Appeal of New Zealand in *R v Hughes* [1986] 2 NZLR 129, Richardson J, having cited *Smith v Illinois*, above, observed (p 147):

> "Clearly the accused cannot be assured of a true and full defence to the charge unless he is supplied with sufficient information about his accuser in order to decide on

> investigation whether his credibility should be challenged."

Then, in a passage which has frequently been quoted, he continued (at pp 148-149):

> "We would be on a slippery slope as a society if on a supposed balancing of the interests of the State against those of the individual accused the Courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given: tomorrow, and by the same logic, it will be that the risk of physical identification of the witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity, for example from behind a screen, in which case his demeanour could not be observed, or by removing the accused from the Court, or both. The right to confront an adverse witness is basic to any civilised notion of a fair trial. That must include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue."

That decision led to a statutory amendment. But when a similar question arose again, in a different context, in *R v Hines* [1997] 3 NZLR 529, a majority of the Court of Appeal adhered to the ratio of the *Hughes* decision, regarding any departure from the common law rule as a matter for Parliament. In both cases, the dissentients recognised the difficulty of restricting the rights of the defence in cases where the credibility of an unidentified witness was in issue: see Cooke P and McMullin J at pp 144 and 153 respectively of *R v Hughes* and Gault and Thomas JJ at pp 554 and 576 respectively of *R v Hines.* Following the decision in *R v Hines* there was again a statutory amendment.

9. In a criminal trial in South Africa the prosecution applied to withhold the name and identity of a witness from the defendant. This application gave rise to a series of rulings by Ackermann J: *S v Leepile* (1-3) 1986 (2) SA 333; (4) 1986 (3) SA 661; (5) 1986 (4) SA 187. In the last of these rulings, the judge concluded that there was no statutory authority to grant the application and said (p 189):

> "The wide direction regarding secrecy sought by the State in the present application has far more drastic consequences for the accused than an *in camera* hearing with a restriction on the publication to the public of a witness' identity. The consequences to the accused of such a wide direction are, *inter alia*, the following:
>
> (a) No investigation could be conducted by the accused's legal representatives into the witness' background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general.
>
> (b) It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him.
>
> (c) It would further heighten the witness' sense of impregnability and increase the temptation to falsify or exaggerate …"

The judge distinguished the anonymity sought from a situation in which a witness' identity is withheld from the general public and commented (p 190) that prosecuting counsel had been unable to refer him to any case, either in South Africa or in England, in which the principle of anonymity had been taken as far as the State sought to take it in the case before him. He continued (p 190):

> "I have further difficulty with the absolute anonymity which the State is seeking for the witness referred to as 'Mpise', and that is the practical implementation of an order granting such anonymity.
>
> To what extent must defence counsel's cross-examination be restricted in order to comply with the order? How much information may he be allowed to elicit from the witness regarding his birth, training, marital status, family, residence and general biographical detail before he runs the risk of infringing the order? If counsel by chance should become aware of the witness' true identity and this leads to the discovery of valuable information regarding the witness' credibility, may this information not be used in cross-examination if it involves disclosure or verification of the witness' true identity? I do not think it far-fetched to imagine that serious difficulties regarding the resolution of these questions

> could arise. If the dispute is resolved in favour of the accused, the order is infringed. If in favour of the State, the accused could be prejudiced and the extent of the prejudice difficult, if not impossible, to assess."

The judge did not regard the examples he had given as far-fetched, but thought they illustrated "the serious, if not irresoluble difficulties which might follow upon the grant of an order in the wide terms sought by the State". He concluded (p 190):

> "The real possibility of such difficulties arising, taken in conjunction with the fact that an order in such wide terms would, for the reasons mentioned, constitute a startling departure from the fundamental principles on which criminal justice is administered in this country, would in my view require the clearest language on the part of the legislature to make such an order competent."

In a judgment delivered by another judge in the same court a few months later this ruling of Ackermann J was not referred to, although an earlier ruling was, and a different decision was given on the same question: *S v Pastoors* 1986 (4) SA 222. A later decision supported the latter ruling, relying on the English judgments in the *Watford* case and *R v Taylor and Crabb* (see below): *S v Ntoae* (6 October 1999, 2000 JDR 0063 (W)). In Australia also there are conflicting state decisions: *R v Stipendiary Magistrate at Southport, Ex p Gibson* [1993] 2 Qd R 687 and *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84.

Recent United Kingdom authorities

10. The first judicial departure from established principle in the United Kingdom occurred in a trial in Belfast arising from the murder of two British army corporals, of which two defendants were accused and convicted. At trial the prosecution adduced the evidence of a number of television journalists who, in the course of their work, had filmed the scene of the killing. The trial judge (Sir Brian Hutton CJ) had given leave that these witnesses should not be identified by name and that, when giving evidence, they might be screened so that their faces should be seen only by the judge and the lawyers on each side, but not by the defendants or the public. The Court of Appeal in Northern Ireland

upheld the trial judge's decision: *R v Murphy and Another* [1990] NI 306.

11. It appears (see p 334) that in making the order he did the judge relied on *Attorney General v Butterworth* [1963] 1 QB 696, *R v Socialist Worker Printers and Publishers Ltd, Ex p Attorney-General* [1975] QB 637 and *Attorney-General v Leveller Magazine Ltd* [1979] AC 440. But the first of these cases related to penalisation of a witness who had given evidence in contempt of court; the second was also a case of contempt, in the publication of the names of blackmail victims (Mr Y and Mr Z), whose true names had been publicly withheld at trial; the third case arose in a similar way concerning a witness referred to at the trial as Colonel B. In none of the cases was any relevant information withheld from the defendant, and in the third (p 447) Lord Diplock observed, obiter, that the justices had correctly rejected an application that the name of another witness should not be disclosed to anyone. In upholding the trial judge's order the Northern Ireland Court of Appeal (pp 334-335) cited *Scott v Scott* [1913] AC 417. That is an important case, recognising that in some exceptional situations there may be a departure from the principle of open justice when justice may only be done if administered in private. Thus it provides for denial of information to the general public, but says nothing about the denial of information to a litigating party, let alone a criminal defendant.

12. If a departure from established principle, the decision in *R v Murphy* was nonetheless a small one: at trial, defence counsel raised no objection to the identities of the witnesses being withheld (p 332); the defence did not challenge that the witnesses feared for their safety if their identities were revealed, nor that it was in the interests of justice that the evidence should be received (p 334); the evidence of these witnesses, although a necessary formal link in the prosecution case, did not implicate the defendants in the commission of crime (pp 332, 335); and the credibility, as opposed to the reliability, of the witnesses was not in issue (p 335). On these last two grounds the court distinguished the strong contrary statements in *Smith v Illinois* 390 US 129 (1968) and *S v Leepile and Others* (5) 1986 4 SA 187 quoted above.

13. In 1992 His Honour Judge Denison QC, sitting at the Central Criminal Court, permitted three witnesses in *R v Brindle and Brindle* (31 March 1992, unreported) to give evidence anonymously in a murder trial (see Lusty, *op cit*, p 391), recognising that this would impose "some inhibition on the full and proper presentation of the defence" but holding that "if the wider interests of justice make it necessary for anonymity …

then the interests of the defence must be subordinated to those wider interests". It does not seem that his decision was appealed. But shortly after, in a challenge to a decision made by a justice at a committal hearing, the Queen's Bench Divisional Court (Beldam LJ and Laws J) were required to consider this procedure: *R v Watford Magistrates' Court, Ex p Lenman* [1993] Crim LR 388, transcript 7 May 1992. The case concerned an offence of violent disorder when a group of youths were said to have rampaged through Watford town centre attacking a number of victims. Several witnesses, fearing for their safety if identified, made statements to the police under pseudonyms, and at the committal hearing application was made that the witnesses should give evidence under these pseudonyms, behind screens and with their voices disguised. The defendants opposed this application and the magistrates' court ruled that the witnesses should retain their anonymity but that the advocates and legal representatives should be able to see the witnesses. The hearing was then adjourned in order that the ruling could be challenged. Giving judgment, Beldam LJ said it was "well established that there may be occasions upon which the interests of justice require that the identity of witnesses should be withheld". The only authority cited in support of that proposition was *R v DJX, SCY and GCZ* (1989) 91 Cr App R 36 ("*R v X, Y and Z*"). That was a case in which screens had been erected so that child victims and the defendants accused of abusing them could not see each other, a procedure approved by the Court of Appeal. But it was a case in which the victims and the defendants were all related to each other and the identity of the child witnesses was very well known to the defendants. The witnesses did not give evidence anonymously and their identities were not withheld. This authority did not support the magistrates' court's decision or that of the Divisional Court upholding it. But the challenge in the *Watford* case related to committal proceedings, not a trial, and Beldam LJ accepted that the ruling might have to be re-considered if it appeared that real prejudice might be caused to any defendant. He also expressly left open the question whether, if the defendants were committed for trial, the witnesses should then be permitted to withhold their identities and give evidence in conditions which would preserve their anonymity.

14. *R v Taylor and Crabb* (unreported, 22 July 1994, Court of Appeal Criminal Division) was an appeal by Taylor and a renewed application for leave by Crabb. The case arose out of a murder trial at the Central Criminal Court before His Honour Judge Denison QC and a jury. At the trial a witness anonymised as Miss A was allowed to give evidence anonymously, without revealing her address, behind a screen so arranged that she, the judge, jury and counsel could see each other directly but she and the defendants could not, although there was a video camera which enabled the defendants to see her by that means while she

was giving evidence. This, as Evans LJ, giving the Court of Appeal judgment, pointed out (at p 19 of the transcript of the judgment) enabled the defendants to be sure that Miss A was no one whom they recognised or who, so far as they were aware, had any motive for giving evidence against them. The court thus considered that any theoretical possibility of prejudice had been eliminated. As Hughes J observed in *R v Bola* (unreported, 18 June 2003), Miss A was no more than a potentially corroborative witness, and it was the accuracy, not the honesty, of her evidence which was in issue. But the Court of Appeal acknowledged (p 10), as the trial judge had done (p 11), that Miss A was an important witness.

15. It was submitted to the Court of Appeal (p 12) that a defendant had a fundamental right to know the identity, in particular the name and address, of a witness called against him, and that any exception to this fundamental right must be very limited indeed save in a case touching on national security. *Smith v Illinois*, above, and *S v Leepile*, above, and *R v Murphy*, above, were cited. The court did not regard these authorities as directly in point, but relied heavily on the Divisional Court decision in the *Watford* case, above, referring also to *R v X, Y and Z*, above. The court accepted (p 17) that the defendant had a fundamental right to see and know the identity of his accusers, in the sense that the right should only be denied in rare and exceptional circumstances, but regarded it as a discretionary decision for the trial judge whether an exception should be made in any given case. The court then laid down guidelines on the exercise of this discretion. The first was that there must be real grounds for being fearful of the consequences if the evidence was given and the identity revealed (even if the concern was expressed by someone other than the witness, as by Miss A's mother in that case). The court continued:

> "Secondly, the evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel them to proceed without it. But the greater its importance, the greater the potential unfairness to the defendant in allowing the witness to remain anonymous. In this context, it seems to us, that a distinction can properly be drawn, as the learned judge drew it here, 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 the reliability and accuracy of the witness rather than credit.
>
> Thirdly, the prosecution must satisfy the court that the creditworthiness of the witness has been fully

> investigated and the results of that enquiry disclosed to the defence so far as is consistent with the anonymity sought.
>
> Fourthly, the court must be satisfied that no undue prejudice is caused to the defendant. 'Undue' is a necessary qualification because some prejudice is inevitable if the order in question is made, even if that prejudice is only the qualification placed on the right to confront the witness as one of the defendant's accusers ...
>
> Finally, the court can balance the need for protection, including the extent of any necessary protection, against the unfairness or appearance of unfairness in the particular case. By referring to the extent of protection, we have in mind other courses which can be taken short of allowing anonymity to the witness. These include, for example, screening, a voice camera, a hearing in camera or whatever it may be."

16. Three comments may be made on this judgment. First, its support in authority is, on analysis, very slight. Secondly, the court gave no reason for disregarding the judgments in *Smith v Illinois* and *S v Leepile* which, to the extent that they reflected the common law, were relevant authorities. Thirdly, as Lord Hutton later pointed out in *R (Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556, para 86, there is a degree of inconsistency between the statement that the accused has a fundamental right to see and know the identity of his accusers save in rare and exceptional circumstances and the court's statement of the factors which the judge should balance in the exercise of his discretion.

17. The next relevant decision, in *R v Liverpool Magistrates' Court, Ex p Director of Public Prosecutions* (1996) 161 JP 43, arose from an order made by a stipendiary magistrate hearing committal proceedings in a drugs case. By his order he had ruled that under-cover officers, although permitted to give evidence shielding their faces from the public in court, should not be permitted to withhold their true names and identity. The Director's application for judicial review of this ruling came before a Queen's Bench Divisional Court (Beldam LJ and Smith J), who granted it. In his leading judgment, Beldam LJ relied on his earlier decision in the *Watford* case, *R v X, Y and Z* and *R v Taylor and Crabb* above. Again, in *R v Jack* (unreported, 7 April 1998) the Court of Appeal followed its own decision in *R v Taylor and Crabb*.

18. The decision of the House in *R(Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, [2002] 1 AC 556 was given on an application for habeas corpus arising from an application to extradite the applicants to the United States. At the extradition hearing the magistrate had relied on anonymous affidavit evidence, and the reception of this evidence was a subject of complaint. The House rejected this complaint and in doing so largely endorsed the reasoning in *R v Taylor and Crabb* above: see paras 44, 81-88, 114, 164-165. This plainly assists the Crown in this appeal. But in my opinion the assistance is small: the applicants did not challenge the correctness of *R v Taylor and Crabb*, on which indeed they founded their argument; there was accordingly no consideration of fundamental principle, and little of authority; extradition proceedings are not a criminal trial and cannot culminate in a conviction; there is in any event no right of cross-examination where duly authenticated evidence is presented in extradition proceedings; and the United States Government had indicated that the anonymity of the anonymous deponent would be disclosed in the United States.

19. Little assistance is gained from the decision of the House in *R(D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 WLR 393. That case concerned special measures, sanctioned by the Youth and Criminal Evidence Act 1999 for the protection of child witnesses, which were upheld by the House. The measures in question permitted the evidence of the victim and another child to be given by a video recorded interview and a live television link. All the evidence was, however, produced in the presence of the defendants, who could see and hear it and had every opportunity to challenge it. The case was, as Baroness Hale of Richmond observed at para 49, "completely different from the case of anonymous witnesses".

20. Reference was made in argument to a number of cases in which appellate courts had upheld the reading of statements made by witnesses who were kept away from the court by fear (eg. *R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257), or death (eg. *R v Al-Khawaja* [2005] EWCA Crim 2697, [2006] 1 WLR 1078) or because they could not be found (eg. *Grant v The Queen* [2006] UKPC 2, [2007] 1 AC 1). Such cases, it was rightly said, showed that there could be departures from the principle that a defendant is entitled to be confronted in court by his accusers. These departures have, however, been the subject of express statutory authorisation, in sections 23-28 of the Criminal Justice Act 1988 and sections 114-126 of the Criminal Justice Act 2003 and, for instance, sections 31A to L of the Jamaican Evidence Act 1843, as amended (considered in *Grant v The Queen*). None of these statutory provisions permits the adducing of a statement by any witness whose

name and identity are not disclosed to the defendant and his advisers. In each instance the court has a discretion to rule that the statement should not be admitted if its admission will result in unfairness to the accused (section 25(1) and (2)(d) of the 1988 Act, section 114(1) and (2)(*i*) and 126 of the 2003 Act, section 31L of the Jamaican Act). In section 124(2) of the 2003 Act and section 31J(1)(b) of the Jamaican Act provision is made for the calling of evidence pertaining to the credibility of a witness which could have been put to him in cross-examination had the witness given evidence in person, and by sections 119(2) and 124(2)(c) of the 2003 Act and section 31J(1)(c) of the Jamaican Act any previous inconsistent statement of a witness may be introduced. These protections are denied to a defendant who does not know who a witness is, save to the extent of any disclosure made by the prosecutor.

21. The House has approved the admission of anonymous written statements by a coroner conducting an inquest: see *R v HM Attorney-General for Northern Ireland, Ex p Devine* [1992] 1 WLR 262. But, as Lord Lane CJ pointed out in the transcript of his judgment of the court in *R v South London Coroner, Ex p Thompson*, reported in part at (1982) 126 SJ 625, an inquest is an inquisitorial process of investigation, quite unlike a criminal trial; there is no indictment, no prosecution, no defence, no trial; the procedures and rules of evidence suitable for a trial are unsuitable for an inquest: see *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, 17. Above all, there is no accused liable to be convicted and punished in that proceeding.

22. *Julie Doherty (suing as personal representative of Daniel Doherty deceased) v Ministry of Defence* (Court of Appeal in Northern Ireland, 5 February 1991, unreported) was a civil action in which the defendant ministry applied that military witnesses should be screened while giving evidence so as to protect their identities. They were also to be identified by letters, not names, but the claimant raised no objection to that. Giving judgment, Sir Brian Hutton CJ distinguished his earlier judgment in *R v Murphy* on the ground that the evidence given by the media witnesses in that case had been of "a very limited nature" whereas the evidence to be given by these military witnesses would be "directly detrimental to the plaintiff's case". He said:

> "I think it appropriate to observe that, in my opinion, counsel for the Ministry in his submissions accorded insufficient recognition to the importance of counsel being able to cross-examine, face to face, an important witness

giving evidence on a vital issue in dispute between the parties. Where issues are in dispute between the parties unimpeded cross-examination plays a vital part in the trial and gives vital assistance to the due administration of justice. I consider that counsel would be impeded in the cross-examination of a witness, whose evidence he wished to challenge, if he could not see his face fully, and I find it difficult to envisage circumstances in which the interests of justice would require that the face of a vital witness giving evidence on an important matter in dispute should be screened from counsel cross-examining him."

Higgins J, concurring, said:

"Mr Kerr in his submission on behalf of the Ministry of Defence questioned the importance of a lawyer appearing in a trial being able to see the witnesses for the opposing side give evidence, even when their evidence is crucial and disputed. I think that in a contested case it is essential that the lawyer for one party should be able to see the demeanour of each witness, called by the other side to give evidence of any importance; to prevent him from viewing such a witness would be a hindrance to his cross-examination.

The exposure of witnesses, even when giving uncontroversial evidence, to the view of the lawyers in the case has been the invariable practice in the common law system of administering justice. It has been one of the features which has contributed to the maintenance of public confidence in the administration of justice. To depart from it in any circumstance, unless there has been consent, would, I consider, diminish public confidence.

The Ministry is seeking to have four witnesses at the trial of this case screened from the sight of all but the trial judge. Those witnesses would be giving evidence in support of the defence of reasonable force, which is likely to be challenged strongly. It is my opinion that to permit, for no matter how compelling a reason, any of those witnesses to be cut off, while in the witness-box, from the view of the plaintiff's lawyers, would be an unacceptable departure from the fundamental principles which govern the conduct of trials throughout the United Kingdom."

23. The House was referred to no case in which protective measures, as defined in para 4 above, have been employed in Scotland.

The European Convention

24. As shown above, the right of a criminal defendant to be confronted by named and identified accusers was well-recognised and established in England for some centuries before adoption of the European Convention. As my noble and learned friend Lord Rodger of Earlsferry suggested in the *Camberwell Green* case, above, para 10, "the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused". It may well be (this was not explored in argument) that the inclusion of article 6(3)(d), guaranteeing to the defendant a right to examine or have examined witnesses against him, reflected the influence of British negotiators. It is in any event clear, as my noble and learned friend observed in the same case, para 11, that "An examination of the case law of the European Court of Human Rights tends to confirm that much of the impact of article 6(3)(d) has been on the procedures of continental systems which previously allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge".

25. I have had the opportunity to read in draft the analysis made by my noble and learned friend Lord Mance of the Strasbourg case law on this subject. I agree with that analysis and gratefully adopt it. It may be, as Mr David Perry QC for the Crown submitted, that a rule originally laid down by the Strasbourg court with reference to the reading of statements has been transposed or extended so as to apply to the giving of evidence by unidentified witnesses. But the rule itself as it now stands is vouched by a series of authorities (*Kostovski v Netherlands* (1989) 12 EHRR 434, para 44; *Doorson v Netherlands* (1996) 22 EHRR 330, para 76; *Van Mechelen v Netherlands* (1997) 25 EHRR 647, paras 55, 63; *PS v Germany* (2001) 36 EHRR 1139, para 24; *Krasniki v Czech Republic* (Appn 51277/99, 28 February 2006, unreported), paras 76, 79, 84). It is that no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses. The reason is that such a conviction results from a trial which cannot be regarded as fair. This is the view traditionally taken by the common law of England.

The argument for the Crown

26. The argument for the Crown, presented persuasively as always by Mr Perry, rested on five main propositions:
(1) The problem of witness intimidation is real and prevalent. In this case, as in many others, witnesses will not give evidence unless their identity is withheld from the defence. If they will not give evidence, dangerous criminals will walk free and both society and the administration of justice will suffer.
(2) As Lord Haldane LC stated in *Scott v Scott* [1913] AC 417, 437, "the paramount object must always be to do justice". That is the purpose which courts of justice exist to serve. 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.
(3) The recent case law, particularly *R v Taylor and Crabb*, above, supports the adoption of protective measures.
(4) The Strasbourg jurisprudence, properly understood, does not condemn the use of protective measures.
(5) The defendant is protected from the risk of unfairness by the prosecutor's duty of disclosure, in particular of material known to the prosecutor as damaging to an unidentified witness, or of a previous inconsistent statement made by such a witness. In this case, it was pointed out, the Crown had duly delivered a disclosure package to the defence, giving details of witnesses' records and previous convictions.

27. I do not for my part doubt the reality of the problem referred to in proposition (1), vividly described by the Court of Appeal in paras 8-12 of its judgment. This is not a new problem (it inspired the procedures of the Inquisition and the Court of Star Chamber), but it is a serious one. It may very well call for urgent attention by Parliament.

28. *Scott v Scott* was addressing a very important principle, that justice should be administered in public, and recognised that there may in some circumstances be a departure from that rule. The rights of a litigating party are, however, the same whether a trial is conducted *in camera* or in open court, and whether or not the course of proceedings may be reported in the media. Nothing in that case is authority for the power of a court to abrogate a long-standing common law right directly bearing on the ability of a criminal defendant to defend himself. It is however pertinent to recall the observations of Lord Shaw of Dunfermline in that case. At pp 477-478 he said:

> "There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure and at the instance of judges themselves."

At p 485 he added:

> "The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider."

29. Some of the recent case law, in particular *R v Taylor and Crabbe*, above, was binding on the Court of Appeal. But the reasons given to support those decisions were not, as I have suggested in paras 10 to 23, sound. By a series of small steps, largely unobjectionable on their own facts, the courts have arrived at a position which is irreconcilable with long-standing principle.

30. For the reasons given by Lord Mance, I cannot accept that the use of protective measures is compatible with the jurisprudence of the Strasbourg court.

31. I do not doubt that the prosecutor in this case performed his duty of disclosure diligently and conscientiously. But the fairness of a trial should not largely depend on the diligent performance of their duties by the prosecuting authorities. All are familiar with notorious cases in which wrongful convictions have resulted from police malpractice, rare though such misconduct is. In this case the disclosure made to the defence, consistently with the protective measures obtaining, contained nothing which would enable the appellant to identify the witnesses giving evidence against him.

32. To decide whether the protective measures operated unfairly in this case it is necessary to consider their impact on the conduct of the defence. For that purpose it cannot be assumed at the outset that the defendant is guilty and all that he says false. The appellant denied that he was the gunman. Why, then, did witnesses say that he was? His answer, on which his instructions to counsel were based, was that he believed the false evidence to have been procured by a former girlfriend with whom he had fallen out. Mr Swift duly sought to pursue this

suggestion in cross-examination of the unidentified witnesses, but was gravely impeded in doing so by ignorance of and inability to explore who the witnesses were, where they lived and the nature of their contact with the appellant. When, eventually, subject to the protective measures, a female witness was called whom the appellant believed to be the girlfriend it was at least doubtful whether she was or not, but this was a question that could not be fully explored. If the jury concluded that she was probably not the former girlfriend, they would also conclude that the defence had been based on a false premise. But this was an unavoidable risk if the defence were obliged, in the words of Lord Hewart CJ in a very different context (*Coles v Odhams Press Ltd* [1936] 1 KB 416), to take blind shots at a hidden target. A trial so conducted cannot be regarded as meeting ordinary standards of fairness.

The Court of Appeal judgment

33. The President gave a long and careful judgment covering the appellant's appeal and also another appeal heard at the same time. Having described the problem of intimidation the President said (para 13):

> "The Court undoubtedly possesses an inherent jurisdiction at common law to control its own proceedings, if necessary by adapting and developing its existing processes, as Lord Morris explained in C*onnelly v DPP* [1964] AC 1254 at 1301 'to defeat any attempted thwarting of its process' ..."

He reviewed the authorities on the reading of statements by absent witnesses (paras 16-24) and considered (paras 25-61) the English and Strasbourg authorities on anonymous unidentified witnesses, concluding that evidence by such witnesses was permissible. He summarised the essential facts and conclusion in the appellant's case (paras 74-101), observing (para 81) of the female witness already mentioned:

> "... The individual said to be responsible for the plot to convict the appellant gave no incriminating evidence against him, while the individuals who did incriminate him were very good friends of the deceased, who were undoubtedly present at the scene, and who, with the

> possible exception of Heath [one of the identifying witnesses], had no reasons of their own to protect the man actually responsible for his death by implicating a man who was not."

The court described the process of disclosure, including the role of a special advocate appointed by the Attorney General at the invitation of the court, with the encouragement of both parties, to assist on issues of public interest immunity. The court expressed its final conclusion in para 101:

> "Without for one moment suggesting that counsel was not faced with unwanted difficulties, and accepting that there were one or two matters which might have been investigated more closely, our conclusion is that the anonymity ruling did not prevent proper investigation with the witnesses, and before the jury, of the essential elements of the defence case. There was significant independent evidence supportive of the evidence of the anonymous witnesses, and the jury chose to accept their evidence after cross-examination, and to reject that of the defendant. There was ample evidence to sustain the conviction. We can discern nothing in the trial process overall to lead us to the conclusion that this trial may properly be stigmatised as an unfair trial, or that the convictions were unsafe. Subject to any fresh evidence, the appeal will be dismissed."

The court heard fresh evidence called by the appellant, subject to protective measures, but found it uncreditworthy and dismissed the appeal.

34. The issue in *Connelly v Director of Public Prosecutions* [1964] AC 1254 was whether the Crown could properly prosecute a count of robbery following the appellant's acquittal of murder, whether the appellant could rely on a plea of autrefois acquit and whether prosecution of the robbery count could be characterised as an abuse of the process of the court. Lord Morris' general observations must be understood in that context. For reasons already given (para 20 above) the domestic law on the reading of statements by identified witnesses, being governed by statute, has little bearing on the present problem. For reasons also given above (paras 10 to 25) I cannot agree with the court's

analysis of the domestic and Strasbourg authorities, although I accept that some of the former were binding upon it. In the English cases stress is consistently laid on the need to ensure that the procedure does not unfairly prejudice the defendant, and the ruling of Hughes J in *R v Bola*, above, is a model of fairness. But there are great dangers in this approach. Thus in para 81 of its judgment, quoted above, the Court of Appeal felt able to find that the individuals who did incriminate the appellant were "very good friends of the deceased" and "had no reason of their own to protect the man actually responsible" for the murders when the appellant had been denied the opportunity fully to investigate whether these facts were true or not. I cannot conclude that this problem was adequately addressed by the Court of Appeal in para 101 of its judgment, in part quoted above. At no point in its judgment does the Court of Appeal acknowledge that the right to be confronted by one's accusers is a right recognised by the common law for centuries, and it is not enough if counsel sees the accusers if they are unknown to and unseen by the defendant.

35. I feel bound to conclude that the protective measures imposed by the court in this case hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair. I would accordingly allow this appeal and remit the case to the Court of Appeal inviting that court to quash the conviction and decide, if application is made, whether to order a retrial.

LORD RODGER OF EARLSFERRY

My Lords,

36. The intimidation of witnesses is an age-old and worldwide problem. When Cicero was intent on prosecuting Verres for his reign of terror in Sicily, highly-placed henchmen of Verres threatened "the fearful and oppressed Sicilian witnesses" with dire consequences if they gave evidence against him. Two thousand years later, still in Sicily, prosecutions of Mafia bosses have been bedevilled by the prevailing atmosphere of intimidation, with its insidious counterpart, the code of silence, omertà. The same goes for prosecutions of Camorra clan members in Campania and drug traffickers in Colombia. Hollywood has made everyone familiar with the problem of witness intimidation in the United States, whether today or in former times. For many years the wall of silence in London's East End frustrated attempts to prosecute the

Kray Twins, until they were taken into custody in 1968 and people felt able to come forward to give evidence. In 1996 worries about the effects of witness intimidation led Strathclyde Police to introduce a Witness Protection Programme.

37. The House was told nothing about the background to this particular case - only that the shooting took place in a flat in Hackney. The Crown does not allege that the appellant was responsible for threatening the potential witnesses. Nor does the material available to the House identify any specific threats that were made to the witnesses. That is not surprising. Leaving the present case on one side, it is obvious that, if people are frightened to give evidence about some crime which they have witnessed, they will be equally frightened to give evidence about any threats that may have been made to deter them from giving evidence. In any event, where implied threats of violence to, or ostracism of, "grasses" are part of the culture of a community, these will often be quite sufficient in themselves to deter potential witnesses. The evidence of a detective officer quoted by the Court of Appeal in paragraph 9 of its judgment paints an all too graphic picture.

38. In the present case the judge was satisfied that the witnesses in question had genuine and reasonable grounds for fearing the consequences if their identities were revealed. That assessment is not challenged. So we are not dealing with the comparatively common situation where, for example, potential witnesses, who are reluctant to give evidence against a fellow gang member, try to use supposed threats as an excuse for not going to court. If a witness citation is issued, such people can be brought to court and the sanction of contempt of court is then available to try to ensure that they speak up. The same applies where witnesses are reluctant to get involved, simply because of a generalised feeling that something unpleasant is liable to happen to those who give evidence about a violent incident which they have seen.

39. But these measures do not assist at the earlier stage when police officers are investigating a crime such as the present. In communities where guns or drug-dealing are part of the culture, people will often refuse to tell the police anything, except on the basis that their identities will not be revealed. In due course the Crown Prosecution Service is presented with evidence obtained on that basis. By the time the matter comes on for trial, the court is really faced with a fait accompli.

40. My noble and learned friends, Lord Bingham of Cornhill and Lord Carswell, have surveyed the domestic case law which has been developed in these circumstances. My noble and learned friend, Lord Mance, has done the same for the cases in the European Court of Human Rights. It would serve no useful purpose for me to repeat that exercise. What stands out, however, is that the domestic cases which permit the use of anonymous witnesses are all remarkably recent. By contrast, when contemplating what steps could be taken to confront the extreme problem of witness intimidation in Northern Ireland in 1972, the Commission chaired by Lord Diplock rejected the idea of witnesses giving evidence anonymously as being inconsistent with the very notion of a trial by judicial process in a British court of law. Three years later, for the same reason, Lord Gardiner's committee also rejected the idea of using anonymous witnesses. There could be no better illustration of the strength of the common law requirements on the point. If anything more is needed, the judgments of Richardson J in *R v Hughes* [1986] 2 NZLR 129 and of Ackerman J in *State v Leepile (5)* 1986 (4) 187 contain powerful statements of the established stance of the common law.

41. Your Lordships were not referred to any Scottish authorities on the point. But, as in England, the principle is so deeply embedded that it scarcely needs stating by the Scottish courts and is often best detected by implication from other rules. One basic rule has always been that, when serving an indictment, the Crown must attach a list of the witnesses whom it intends to call, along with their addresses. That rule, which is subject to certain strictly limited exceptions, is currently embodied in sections 66(4) and 67 of the Criminal Procedure (Scotland) Act 1995. The purpose of the rule is to allow the representatives of the accused to take a precognition (statement) from the potential Crown witnesses.

42. At one time, Scots Law recognised a catalogue of more or less exotic grounds on which the competency of a witness could be challenged – for instance, infamy or enmity and partial counsel. See A Alison, *Practice of the Criminal Law of Scotland* (1833), pp 429-505. Many of the same objections could be raised in England. See, for instance, J Chitty, *A Practical Treatise on the Criminal Law* (second edition, 1826) vol 1, pp 587–605. In both jurisdictions the availability of such challenges tended to presuppose a system in which the identity of the witnesses for the prosecution was known. In Scotland, Hume warns that any challenges must be taken before the witnesses give their evidence: "As the witnesses are successively called into Court to be examined, they are presented to the pannel [ie the accused], and he is

desired to say with respect to each, whether he have any objection to him as a witness": D Hume, *Commentaries on the Law of Scotland, respecting Crimes* (fourth edition, 1844) vol 2, p 376. Hume simply assumes that the accused will be able to see the witnesses and so be in a position to take any objection. Similarly, in both jurisdictions the rules on the evidence of an accomplice, for example, would have been unworkable if the identity of the witness could have been hidden.

43. Given the statutory requirements, it is perhaps not surprising that there is no reported Scottish authority on the use of anonymous witnesses. I understand, however, that in one case, some years ago, steps were taken to prevent the identity of certain prosecution witnesses from being discovered by members of the public. The arrangements were specifically designed to ensure, however, that the accused and their counsel were able to see the witnesses and to hear them giving their evidence in their ordinary voices.

44. My Lords, it is axiomatic that the common law is capable of developing to meet new challenges. But threats of intimidation to witnesses and the challenge which they pose to our system of trial are anything but new. In theory, the common law could have responded to that challenge at any time over the last few hundred years by allowing witnesses to give their evidence under conditions of anonymity. But it never did - even in times, before the creation of organised police forces, when conditions of lawlessness might have been expected to be far worse than today. Moreover, Lord Diplock saw the common law principle as so fundamental that he felt unable even to recommend that legislation should be passed to interfere with it. In these circumstances, while I am very conscious of the problems confronting the authorities which have led them to adopt these measures, in my view it is not open to this House in its judicial capacity to make such a far-reaching inroad into the common law rights of a defendant as would be involved in endorsing the procedure adopted in the present case. In effect, the ability of counsel for the appellant to cross-examine the decisive witnesses against him was gravely compromised. Similarly, for the reasons given by Lord Mance, the appellant's trial did not meet the standard required by article 6 of the European Convention. In the circumstances it is unnecessary to decide whether the decision in *R v Murphy* [1990] NI 306 is consistent with the common law.

45. It is for the Government and Parliament to take notice if there are indeed areas of the country where intimidation of witnesses is rife and to decide what should be done to deal with the conditions which allow it to

flourish. Tackling those conditions would be the best way of tackling the problem which lies behind this appeal. Any change in the law on the way that witnesses give their evidence to allow for those conditions would only be second best. But Parliament is the proper body both to decide whether such a change is now required, and, if so, to devise an appropriate system which still ensures a fair trial.

46. Accordingly, for the reasons given by your Lordships, I agree that the appeal should be allowed and that the House should make the order proposed by Lord Bingham.

LORD CARSWELL

My Lords,

47. Ensuring fairness is a fundamental obligation of judges presiding in criminal trials, as the means of achieving their ultimate objective of achieving justice, whatever other factors or demands they have to balance. The difficulty of doing so is well exemplified by the present appeal. The trial judge carefully and conscientiously weighed up the competing considerations and took great pains in attempting to achieve a satisfactory method of proceeding. The Court of Appeal gave equally careful thought to the problem and expressed its conclusions in a notably thorough judgment. In spite of this, concerns remain, which have caused your Lordships to take a different view. I confess to having felt great difficulty about the case, but I have eventually come to agree with your Lordships' conclusion, for the reasons which I shall set out.

48. My noble and learned friend Lord Bingham of Cornhill has set out the facts and the effect of the judge's rulings at the trial and I gratefully adopt his account.

49. It is not in dispute that the court has an inherent jurisdiction at common law to control its own proceedings, if necessary by adapting and developing its existing processes: see the discussion in paras 13 *et seq* of the judgment of the Court of Appeal. It is also clear, as Lord Bingham has set out, that there is a strong imperative in favour of open justice, described by Earl Loreburn in *Scott v Scott* [1913] AC 417, 445

as an "inveterate rule." Viscount Haldane LC carefully limited the ambit of any exceptions to that rule at pages 437-8:

> "As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity."

To that long-established principle of the common law must be added a cognate one, the right of an accused to confront his accuser. The force of these two principles is such that it requires a clear case of countervailing necessity to allow the admission of any inroad.

50. The extent of the inroad in the present case was substantial. The identity of the witnesses in question was withheld from the defence and the defendant's counsel was not permitted to ask questions which might lead to that being disclosed. The witnesses were screened in such a way that although the judge and jury could see them, neither the defendant nor his counsel could, nor could members of the public. Their voices were purposely distorted by the amplifying equipment so that they could not be recognised by the defendant, although again the judge and jury could hear their true voices. Their antecedent histories and records of any convictions were supplied to the defence, but edited so as to conceal their identities.

51. It is indisputable that this would have had a hampering effect on the conduct of the defence, which was that the appellant was falsely accused of the victim's murder for oblique reasons of the witnesses. The credibility of the Crown witnesses was squarely in issue, and the handicap which these restrictions imposed upon the defence was accurately described by Fortas J in the US Supreme Court in *Smith v Illinois* (1967) 390 US 129, 130:

> ". . . when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address opens countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

These were further spelled out by Ackermann J in the South African case of *State v Leepile (5)* 1986 (4) SA 187, 189:

> "The consequences to the accused of such a wide direction are, inter alia, the following:
>
> (a) No investigation could be conducted by the accused's legal representatives into the witness' background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general.
>
> (b) It would make it more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him.
>
> (c) It would further heighten the witness' sense of impregnability and increase the temptation to falsify or exaggerate."

52. The prosecution seeks to resort to such expedients to conceal the identities of witnesses because of the fear expressed by them, leading to their unwillingness to testify. Those who have had to deal with prosecuting or presiding in trials in places where intimidation is rife are very well aware of how insidious it can be. Where paramilitary bodies have held sway, it has in the past proved impossible to persuade civilian witnesses to give evidence, even about the most innocuous facts, through well-founded fear that, however thoroughgoing the anonymising process, it would be discovered that they had done so, which would subject them to savage reprisals. Even in less extreme

circumstances, it can be a serious problem in some areas, and ruthless intimidation can prove very successful in discouraging the provision of testimony in court. It is said that witness intimidation has become an increasing problem in England and Wales in recent years. Figures published by the Ministry of Justice show that convictions for intimidation doubled in number between 1996 and 2005, which tends to suggest that this may be the case. The House was informed in the course of argument that applications for witness anonymity have become more common and that judges feel under some constraint to accede to them, if prosecutions are not to collapse. The issue for decision is whether the steps taken in the present case deprived the appellant of a fair trial.

53. Lord Bingham has discussed in his opinion a wide range of cases in which the anonymity of witnesses has been concerned, to greater or lesser degree, and so I propose to focus my attention mainly on those few reported cases of criminal trials in which it has been allowed. The first, which has been regarded as the pioneer in the field, is the decision of the Northern Ireland Court of Appeal in *R v Murphy* [1990] NI 306. In that case no evidence was forthcoming from direct eye-witnesses identifying the perpetrators of the murder and the main source of identification was the "heli-tele" film, which captured the whole incident continuously on film from an Army helicopter hovering some height above the scene. A secondary source of evidence implicating the defendants was film images taken by press photographers which tended to identify them as having been in the vicinity of the killing at times leading up to its occurrence. The photographers who took these films were called to prove the taking of the pictures, but they were not asked to make any personal identification of either defendant. They were concerned for their safety if their identities became known to the defendants or members of the public. They feared, not without justification, that if they again appeared in the area where the murder had taken place or other disturbed parts of Belfast they might be attacked, when recognised as persons who had given assistance in the trial of the defendants. The trial judge permitted them to be known by letter instead of by name and they were screened from the view of the defendants and the public. They were visible to the judge, who tried the case without a jury, and counsel, who were not asked to give any undertaking. It may be observed that their testimony, though of some importance, was not like direct identifying evidence. Their credibility was not in issue nor was there any necessity to inquire about their background or motives. Counsel had objected to the concealing of the witnesses' faces from the defendants. The Court of Appeal approved the judge's course of action. It is notable that a different decision was reached in the civil appeal in Northern Ireland of *Doherty v Ministry of*

Defence (1991, unreported). As Lord Bingham has set out in para 22 of his opinion, the court regarded the evidence of the military witnesses as "directly detrimental to the plaintiff's case." The Ministry's request was that four serving soldiers should when giving evidence be screened from all but the trial judge and that two former soldiers should be screened from all but the trial judge and the legal representatives of the parties. Hutton LCJ, who had been the trial judge in *R v Murphy,* distinguished that decision on the facts and the members of the court underlined the importance of counsel cross-examining being able to see the face of the witness.

54. *R v X, Y and Z* (1989) 91 Cr App R 36 concerned rather different issues. It was known that child victims in such cases are reluctant to give evidence, being unwilling or unable to speak about the facts to be proved. The judge approved the erection of a screen which prevented the children from seeing the defendants or being seen by them. Their identity was well known to the defendants and counsel could see them as they gave evidence. It is clear that the object in this case was, as the Common Serjeant said, to prevent the children from being influenced one way or the other by the defendants in the dock or being intimidated by their surroundings. The Court of Appeal upheld the convictions. It does not seem to me that this decision, which was plainly justifiable in the circumstances, gives much assistance on the present issues.

55. In *R v Watford Magistrates' Court, Ex p Lenman* [1993] Crim LR 388 an order was made in committal proceedings and upheld on appeal which permitted witnesses to be screened from the defendants and their voices to be distorted, though they were visible to the lawyers. As Lord Bingham has pointed out (para 13), the question was left open on appeal whether the witnesses' anonymity could be maintained when the case came to trial in the Crown Court.

56. In *R v Taylor and Crabb* (1994, unreported) the witness in question was a young girl known in the proceedings as Miss A, who gave corroborative evidence tending to identify Taylor as one of the men who carried the body of the murder victim from a public house into a horsebox, the main evidence against him being given by witnesses who could be regarded as accomplices. She was permitted to give evidence under screening arrangements whereby she could be seen by counsel and the jury, but not by the defendants. The latter could nevertheless see her by means of a video camera, so enabling them to ascertain whether they knew or could recognise her. The court held, after balancing the factors which might lead to unfairness against those

in favour of allowing this degree of anonymity, that the trial judge had correctly exercised his discretion and dismissed the appeal.

57. Lord Bingham has discussed in para 20 a series of cases in which the courts have upheld the reading of statements made by witnesses who were kept away from the court by fear or for other reasons. I agree with him that there are several points of distinction between these cases and the present appeal. First, the practice is founded upon direct statutory authority. Secondly, the names and addresses of all such witnesses are disclosed to the defendant and his advisers, who are able to adduce material tending to undermine the credit of the maker of the statement. Thirdly, the court has a discretion to rule that the statement should not be admitted if its admission will result in unfairness to the defendant. The Northern Ireland courts have generally declined to allow the admission of such statements where they would form the sole or decisive evidence implicating the defendant: see, eg, *R v Singleton* [2003] NICA 29, [2004] NI 71.

58. My noble and learned friend Lord Mance has set out the material decisions of the European Court of Human Rights, to which I would refer. The Court of Appeal in the present appeal reviewed the Strasbourg jurisprudence in some detail, but concluded (para 51) that it did not require the exclusion of testimony given anonymously even if it was the sole or decisive evidence implicating the accused. I agree with the view expressed by the Court of Appeal that it is not always easy to discern which type of evidence is concerned in the various decisions of the ECtHR, but I feel less certain that that court would regard it as acceptable to allow a conviction to be based on the testimony of a witness given in the circumstances of the present case, if that were the sole or decisive evidence against the accused. That concept of the sole or decisive evidence has been regularly repeated in the jurisprudence of the Court, going back to *Kostovski v The Netherlands* (1989) 12 EHRR 434, and progressing through *Doorson v The Netherlands* (1996) 22 EHRR 330, *Van Mechelen v The Netherlands* (1997) 25 EHRR 647 and *Lucà v Italy* (2001) 36 EHRR 807. Although the Court may have used this phrase mainly in the context of evidence of a different kind from the oral testimony given in our courts, I consider that the principle is more universal and that it could and should be applied to the anonymising of evidence in criminal trials in this jurisdiction.

59. It is possible to distil some propositions from this review:

(a) There is a presumption in favour of open justice and confrontation of a defendant by his accuser.

(b) It is possible in principle to allow departures from the basic rule of open justice to some extent, but a clear case of necessity should be made out.
(c) The court should be sufficiently satisfied that the witness's reluctance to give evidence in the ordinary manner is genuine and that the extent of his or her fear justifies a degree of anonymity.
(d) Anonymising expedients may include the withholding of the witness's name and address, screening of the witness from the defendant and the public, screening from the defendant's legal advisers, disguising of the witness's voice from the defendant and the public and disguising of the voice from the legal advisers.
(e) The more of these expedients the court might consider adopting, the stronger the case must be for invading the principle of open justice. Determination of the question depends upon balancing to ensure that the trial continues to be fair.
(f) An important consideration is the relative importance of the witness's testimony in the prosecution case. If it constitutes the sole or decisive evidence against the defendant, anonymising which prevents or unduly hinders the defendant and his advisers from taking steps to undermine the credit of the witness is most likely to operate unfairly. It is a question of fact in any given case what, if any, measures would be compatible with sufficient fairness of the trial. Courts trying criminal cases should not be over-ready to resort to such measures, and I would commend to them the words of the Court of Appeal (in the context of reading statements) in *R v Arnold* [2004] EWCA Crim 1293, para 30, cited in *R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257, 3277, para 55:

> "30. We cannot leave this case without sounding a word of caution. The reference in *Lucà v Italy* to the not infrequent occurrence of the phenomenon of frightened witnesses being unwilling to give evidence in trials concerning Mafia-type organisations is echoed across a wider range of serious crime in this country. Counsel both confirmed that this problem was becoming commonplace and the experience of the members of this court concerned with the conduct of criminal trials is likewise. Inevitably, applications under section 23 will follow but this judgment should not be read as a licence for prosecutors. Very great care must be taken in each and every case to ensure that attention is paid to the letter and spirit of the Convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read. Where that witness provides the sole or determinative evidence against the accused, permitting it to be read may well,

> depending on the circumstances, jeopardise infringing the defendant's article 6(3)(d) rights; even where it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved."

As a general rule it is unlikely that the trial will be fair if a very substantial degree of anonymising of evidence is permitted where the testimony of the witnesses concerned constitutes the sole or decisive evidence implicating the defendant.

60. This set of propositions omits one factor which may in some cases be of considerable significance. If it is established that the defendant himself has created the fear felt by the witness and made him or her afraid to give evidence, can he be heard to complain of unfairness if the court allows the evidence to be given anonymously? This issue was discussed by the Court of Appeal in *R v Sellick*, *supra* which concerned the reading of the statements of four witnesses. At paras 52-3 Waller LJ, giving the judgment of the court, posed the question in clear terms:

> "52. If the European court were faced with the case of an identified witness, well known to a defendant, who was the sole witness of a murder, where the national court could be sure that that witness had been kept away by the defendant, or by persons acting for him, is it conceivable that it would hold that there were no 'counterbalancing' measures the court could take which would allow that statement to be read. If care had been taken to see that the quality of the evidence was compelling, if firm steps were taken to draw the jury's attention to aspects of that witness's credibility and if a clear direction was given to the jury to exercise caution, we cannot think that the European court would nevertheless hold that a defendant's article 6 rights had been infringed. In such a case, as it seems to us, it is the defendant who has denied himself the opportunity of examining the witnesses, so that he could not complain of an infringement of article 6(3)(d), and the precautions would ensure compliance and fairness in compliance with article 6(1). We for our part see no difficulty in such a clear case.

> 53. More difficulty arises in cases where it is not quite so clear cut, but the court believes, to a high degree of probability, that identified witnesses are being intimidated for and on behalf of the defence, and where the court is sure to the criminal standard of proof that witnesses cannot be traced and brought before the court (Butterfield J's state of mind on Lee in the instant case). In our view, having regard to the rights of victims, their families, the safety of the public in general, it still cannot be right for there to be some absolute rule that, where compelling evidence is the sole or decisive evidence, an admission in evidence of a statement must then automatically lead to a defendant's article 6 rights being infringed. That would lead to a situation in which the more successful the intimidation of the witnesses, the stronger the argument becomes that the statements cannot be read. If the decisive witnesses can be 'got at' the case must collapse. The more subtle and less easily established intimidation provides defendants with the opportunity of excluding the most material evidence against them. Such an absolute rule cannot have been-intended by the European court in Strasbourg."

The issue does not arise directly in the present case, for there is no finding that the fear of the witnesses was deliberately instilled by intimidation on the part of the defendant or any person acting on his behalf. Where such intimidation can be clearly laid to the door of a defendant or those acting for him (and I apprehend that it would have to be established beyond reasonable doubt : cf *R v Acton Justices, Ex p McMullen* (1990) 92 Cr App R 98, 104, per Watkins LJ) then it seems to me that such a defendant would be faced with considerable difficulty in advancing the proposition that the trial has been made unfair if the witness's testimony is anonymised and he is preventing from pursuing an attack upon his or her credit. I do not wish to express a final opinion on the point, however, which may require further argument on some future occasion.

61. The trial judge went to a good deal of trouble to mitigate as far as he could the adverse effects of anonymising the witnesses and prosecuting counsel conscientiously produced all available material about those witnesses, in an effort to ensure that the defence was informed of everything that might be relevant. The court felt able, after examining the issues and the authorities, to conclude that the anonymity did not prevent proper investigation of the witnesses and effective cross-examination, so that the trial remained fair and the conviction was safe.

I feel impelled to the view, not without some hesitation, that I am unable to agree with the conclusion of the Court of Appeal. The testimony of the witnesses concerned was central to the prosecution case. The defence was an attack upon their probity and credibility, yet the defendants and their advisers did not have their names and were unable to see their faces or hear their natural voices. The effect, as intended, was to make it impossible to identify them, which may have been necessary if their testimony was to be obtained, but was a significant potential detriment to the conduct of the defence. The anonymising measures went beyond any which have been adopted in the reported cases. Where such thoroughgoing measures are to be taken, the court should be very sure that the hampering effect will not make the trial unfair. I do not think that one could be sufficiently sure of that in the present case.

62. It follows that I would hold, in agreement with your Lordships, that the conviction was unsafe and concur with the order proposed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

63. When originally I was party to the grant of leave to appeal in this case I was not, I confess, expecting the appeal to succeed. Clearly, however, it raised an issue of high principle and deserved to be heard. Now having heard the argument and had the advantage of reading in draft the opinions of my noble and learned friends Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Mance, I entertain no doubt whatever that the appeal must indeed be allowed. I find my Lords' logic utterly compelling.

64. Particular respect though I acknowledge must be accorded to whatever views are expressed by my noble and learned friend Lord Carswell in this area of the law, given his own vast experience of the problems posed by the intimidation of witnesses, I find myself in the end unable to accept that the problem can be dealt with on so flexible a basis as he proposes—see, for example, the final sentence of para 59 of my Lord's opinion.

65. I have no difficulty whatever with the decision of the Northern Ireland Court of Appeal in *R v Murphy* [1990] NI 306—discussed by Lord Bingham at paras 10-12 and by Lord Carswell at para 53—and nor, it is to be noted, did the European Commission of Human Rights which found Murphy's application under article 6 of the Convention to be manifestly ill-founded: *X v United Kingdom* (1992) 15 EHRR CD 113. But that case seems to me to come close to the limits to which the courts should go in permitting any invasion of the core common law principle that the accused has a fundamental right to know the identity of his accusers. By 'accusers' I mean in this context those giving the sole or decisive evidence pointing to the accused's guilt, as the three identifying witnesses in the present case.

66. I find Lord Mance's analysis of the Strasbourg jurisprudence entirely convincing. If, consistently with it, the government now think it right to legislate in this field, so be it. Meantime, however, the creeping emasculation of the common law principle must be not only halted but reversed. It is the integrity of the judicial process that is at stake here. This must be safeguarded and vindicated whatever the cost.

LORD MANCE

My Lords,

67. I have had the benefit of reading in draft the judgments of my noble and learned friends, Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell. I gratefully adopt the account of the factual background and issues set out by Lord Bingham in his paras 1 to 4.

A right to confrontation?

68. Lord Bingham in para 5 et seq discusses the long-established principle of English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence. Common law exceptions to this principle include the rules permitting proof of dying declarations in cases of homicide and of statements made by witnesses as part of the *res gestae*.

Another common law exception is the rule, recognised by the Judges in *Lord Morley's case* (1666) 6 St Trials 770, para 5 and permitting the reading at trial of a statement by a witness who had been deposed before a coroner but who was absent at trial because detained by the means or procurement of the defendant incriminated by the statement. Subsequent authorities were considered and this exception again accepted in *R v Scaife* (1851) 17 QB 238, where Hunter arguendo (at p 241) referred to the maxim that justice "will not permit a party to take advantage of his own wrong" and also noted (p 240) that the coroner's deposition in *Lord Morley's case* had probably been taken in the absence of the defendant. The exception was endorsed by the United States Supreme Court (though wrongly attributed to the House itself) in *Reynolds v United States* 98 U.S. 145 (1878), 158-9, as an "outgrowth" of the same maxim which "if properly administered, can harm no one". It was recently referred to by the Supreme Court in *Crawford v Washington* 124 S Ct 1354 (2004), 1370 as a "rule of forfeiture by wrongdoing (which we accept), [which] extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability".

69. In *R (D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 WLR 393, para. 14, my noble and learned friend Lord Rodger said of the right of confrontation enshrined in the Constitution of the United States by the Sixth Amendment that:

> "It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today's world. It overlaps, to some extent, with article 6(3)(d) of the Convention as interpreted by the European court. But, as interpreted by the Supreme Court, the Sixth Amendment appears to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused. For my part, I would certainly not disparage the thinking behind that requirement. But, whatever its merits, this line of thought never gave rise to a corresponding requirement in English law. That is amply demonstrated by the very brevity of the decision of the Court of Criminal Appeal in *R v Smellie* (1919) 14 Cr App R 128, holding that a judge could remove the accused from the sight of a witness whom his presence might intimidate."

In the same vein, my noble and learned friend, Lord Bingham, giving the advice of the Board in *Grant v The Queen* [2006] UKPC 2, [2007] 1 AC 1 observed, at para 20, that

> "the right to confrontation expressed in the sixth amendment to the US Constitution, for all its interest to legal antiquarians, is not matched by any corresponding requirement in English law: *R (D) v Camberwell Green Youth Court* …. para 14".

In *R v Smellie* a defendant accused of mistreating his eleven year old daughter was ordered to sit upon the stairs leading to the dock, out of her sight, in order to avoid her being intimidated. The Court of Criminal Appeal rejected in the shortest of judgments (p 130) an objection rested on, inter alia, a proposition that "a prisoner is entitled at common law to be within sight and hearing of all the witnesses throughout his trial" (p 128).

70. There have also been some statutory provisions authorising special measures under certain conditions (see Youth Justice and Criminal Evidence Act 1999, sections 16-36, permitting screening (though not from the judge and any jury, legal representatives or any interpreter) and evidence by video link or recording, as well as sections 23-28 of the Criminal Justice Act 1988 or now sections 114-126 of the Criminal Justice Act 2003 discussed by Lord Bingham in para 20. As Lord Bingham notes, the latter provisions allow the admission in evidence in certain situations of statements not made in oral evidence, but they involve disclosure of the witness's identity and permit a defendant to respond by giving evidence of any prior inconsistent statement by the witness and, exceptionally, of any material which, had the witness been called, could have been put to him or her in cross-examination.

Anonymous witnesses?

71. The right to confrontation recognised in the United States has, therefore, no exact counterpart in English common law. But the question remains whether there are circumstances under English common law in which evidence may be given anonymously. This is not the same question as whether evidence should be given in public. Both in *Scott v Scott* [1913] AC 417 and in article 6 of the European Convention on

Human Rights, it is recognised that there can be special circumstances in which courts may in the interests of justice sit in private, in particular where the administration of justice would otherwise be rendered impracticable or prejudiced. But recognition of a limited exception of that nature does not touch the question whether there are circumstances in which a judge may allow a witness to remain anonymous in relation to a defendant. The recent authorities indicate various possible degrees to which this may occur. At one end of the spectrum, the witness is known by sight (though not true name) and is present and visible at the trial but referred to under a pseudonym. At the other, the witness not only has his or her identity concealed, but is, as here, concealed from sight and has his or her voice distorted in relation to all but the judge, jury and counsel (though here counsel for the appellant declined to be put in a position different from that of his client). In all such cases any cross-examination likely to elicit identity will have to be excluded, if the anonymity granted is to be maintained. The prosecution can take steps to provide relevant background details, such as any prior criminal record, but they will have to avoid giving any information which could lead to identification. And in all such cases the problem exists that the concealment of identity means that the defendant cannot himself check, investigate or (save by guesswork) give directly any relevant information about the character, motives or reliability of the witness. The defence is to that extent potentially hampered both in cross-examination and in relation to any positive case and evidence which it can adduce.

72. In many cases, particularly cases where credibility is in issue, identification will be essential to effective cross-examination. In both *Smith v Illinois* 390 US 129 (1968) and *State v Leepile and Others (5)* 1986 (4) SA 187 the credibility of the witness was central to the case against the defendant, and it was said in the former case (at p 132) that ignorance of the witness's identity was "effectively to emasculate the right of cross-examination". In *R v Hughes* [1986] 2 NZLR 129, 149, Richardson J was referring to the potential significance of credibility when he said that "I cannot presently perceive any circumstances at common law under which a witness whose credibility may be in issue depending on the results of inquiries should be allowed to hide his real name and in the result foreclose any inquiries of that kind".

73. In *R v Murphy and Anor* [1990] NI 306, the situation was quite different, and the cases of *Smith v Illinois* and *State v Leepile (5)* were distinguished accordingly. The photographers' evidence was relied on to do no more than prove the video film and photographs that they had taken of the funeral, from which police officers identified the

defendants. The photographers' evidence "did not implicate either appellant" (per Kelly LJ, p 334), except in the sense that they produced objectively unchallengeable material from which others were able to do so. In the later Northern Irish case of *Doherty v Minister of Defence* (5 February 1991), Sir Brian Hutton LCJ highlighted this distinction. Lord Bingham observes that, if *Murphy* was a departure from established principle, it was a small one (para 12). Courts have an inherent power to control their own proceedings, and I consider that *R v Murphy* involves a limited qualification on the right to know the identity of prosecution witnesses which represents no threat to the fairness of the trial and which the common law can and should accommodate.

74. The question is whether the common law should go further. There are powerful statements, particularly in the New Zealand cases of *R v Hughes* (above) and *R v Hines* [1997] 3 NZLR 529, cautioning against the risks "if on a supposed balancing of the interests of the State against those of the individual accused the Courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial" (per Richardson J in *Hughes* at p 148), and saying that any change in the law was a matter for the New Zealand Parliament (which did in fact respond by legislation after each of these decisions).

The Strasbourg case-law

75. The use of anonymous evidence at the trial stage has been the subject of a series of cases decided by the European Court of Human Rights in the context of the Convention on Human Rights. The following points arise. First, the Court's starting point is that

> "the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which the evidence was taken, were fair."

See *Doorson v The Netherlands* (Application No 20524/92) (1996) 22 EHRR 330, para 67, *Van Mechelen v The Netherlands* (Application Nos

21363/93, 21364/93, 21427/93 and 22056/93) (1997) 25 EHRR 647, para 50 and *PS v Germany* (Application No 33900/96) (2001) 36 EHRR 1139, para 19.

76. Secondly, the Court has repeatedly stated that the use of anonymous evidence "is not under all circumstances incompatible with the Convention": see *Doorson*, para 69, *Van Mechelen*, para 52 and *Visser v The Netherlands* (Application No 26668/95) (unreported) 14 February 2002, para 43. In para 70 in *Doorson* (much quoted in subsequent cases: see eg *PS v Germany*, para 22, *Van Mechelen*, paras 53-54 and *Visser v The Netherlands*, para 43) the Court explained the rationale:

> "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."

77. In *Doorson* the charge was of drug trafficking and two witnesses were at the appeal stage examined anonymously before an investigating judge in the presence of the defendant's lawyer who was able to cross-examine, though not to ask questions which would reveal identity. The investigating judge knew the identity of the witnesses, and made a full report of their evidence, including circumstances from which the Court of Appeal was able to make an assessment of their credibility. Anonymity had been granted because the witnesses feared reprisals from the defendant. The Strasbourg Court said in para 71 that "This is certainly a relevant reason to allow them anonymity", and concluded on the facts that the court had adopted a sufficient counter-balancing procedure to enable the defence to challenge the anonymous witnesses at the later appeal hearing, by inter alia drawing attention to the fact that

both were drug addicts. The Strasbourg Court went on to say that it was sufficiently clear that the Amsterdam Court did not base its finding of guilt solely or to a decisive extent on the evidence of the anonymous witnesses (a conclusion difficult to follow on the facts, bearing in mind the non-appearance or failure to come up to proof of the only other two named witnesses against the defendant, N and R: see paras 10 and 18).

78. After citing with approval para 70 of the Court's judgment in *Doorson* the Court in *PS v Germany* (Application No 33900/96) (2001) 36 EHRR 1139 went on:

> "In appropriate cases, principles of 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 coming generally within the ambit of Art. 8 of the Convention."

However (contrary to the Court of Appeal's apparent treatment of the case in para 48 of its present judgment) *PS Germany* was not a case on anonymity. It was a case of a conviction for sexual abuse of an eight-year-old child based to a decisive extent on out of court statements by the child whom the defendant had not had the opportunity of questioning or observing give her evidence.

79. Thirdly, the phrasing by the Court of the last two sentences of para 70 in *Doorson* and its use of the word "require" in para 22 in *PS v Germany* could be read as suggesting that Member States might, in some circumstances and on a balancing of interests, be required to permit witness anonymity. But it seems to me unlikely that the Court intended to go so far. It is of some interest to consider *Recommendation No R(97) 13* of the Committee of Ministers of the Council of Europe. The recitals note "the increasing risk that witnesses will be subjected to intimidation" and consider that "it is unacceptable that the criminal justice system might fail to bring defendants to trial and obtain a judgment because witnesses are effectively discouraged from testifying freely and truthfully" and that there should be "greater recognition given to their [witnesses'] rights and needs, including the right not to be subject to any interference or be placed at personal risk". They further note the provisions of and case-law on the Convention on Human Rights "which recognise the rights of the defence to examine the witness and to challenge his/her testimony but do not provide for a face to face

confrontation between the witness and the alleged offender". The text of the Recommendation includes not merely provisions to enable a witness to give evidence in a separate room or by pre-trial examination, but also provisions regarding anonymity:

> "10. Where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.
>
> 11. Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that:
> - the life or freedom of the person involved is seriously threatened or, in the case of an undercover agent, his/her potential to work in the future is seriously threatened; and
> - the evidence is likely to be significant and the person appears to be credible.
>
> 12. Where appropriate, further measures should be available to protect witnesses giving evidence, including preventing identification of the witness by the defence, for example by using screens, disguising the face or distorting the voice.
>
> 13. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons."

Recommendation No R(97) 13 is no more than that - a recommendation. The opening words of its para 10 ("Where available and in accordance with domestic law ….") show awareness that not all the domestic laws of member states may provide for anonymous evidence, while para 13 accepts that there may be circumstances where, in the words of the recital, "the criminal justice system might fail to bring defendants to trial and obtain a judgment" because this would only be possible if a central witness could be given anonymity.

It was not suggested in argument before the House that the Strasbourg Court would go further than the Recommendation in these respects and the matter is on its face one for national procedural law. I proceed therefore on the basis that there is no *requirement* on national legal systems under the Convention to provide for anonymous witnesses in any circumstances.

80. Fourthly, the Strasbourg Court said in para 76 in *Doorson* that:

> "76 Finally, it should be recalled that, even when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements. ….."

Similar statements appear in paras 55 and 56 in *Van Mechelen v The Netherlands* and in para 76 in *Krasniki v Czech Republic* (Application No 51277/99) (unreported) 28 February 2006. The caveat that a conviction should not be based "to a decisive extent" on anonymous evidence can be traced back to the Strasbourg Court's earlier decision in *Kostovski v The Netherlands* (Application No 11454/85) (1989) 12 EHRR 434. There, the conviction for armed robbery had been based on statements of two anonymous witnesses both heard by the police and one also heard by an examining magistrate, in each case in the absence of the defendant and his counsel. Both the opportunity for cross-examination and the existence of a full investigating magistrate's report from which conclusions as to credibility could be drawn by Dutch trial court and Court of Appeal were seen in *Doorson* (para. 73) as factors distinguishing *Doorson* from *Kostovski*. The Court in *Kostovski* also noted that the Netherlands accepted that the conviction was based to a decisive extent on the anonymous statements.

81. In practice however, where the Strasbourg Court has found a violation of the right to a fair trial, it has commonly done so by reference to a conjunction of considerations, and not merely because the conviction was based solely or decisively on anonymous evidence. Thus, in *Windisch v Austria* (Application No 12489/86) (1990) 13 EHRR 281 a mother and daughter reported that they had the previous evening seen two suspicious looking men near the place where a robbery had that evening taken place, and had noted down their minibus licence number. They also identified the defendant as one of the men at a covert confrontation arranged by the police. The two women feared

retaliation and the trial court rejected defence requests to have them summoned to appear to be examined. Their written statements to the police were simply produced by the relevant police officers (who the defence were able to question). The Strasbourg Court said that, being unaware of the witnesses' identity, "the defence was confronted with an almost insurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility" (para 28). Further their identification was the only evidence indicating the defendant's presence on the scene of the crime. There had been a violation of article 6.

82. In *Lüdi v Switzerland* (Application No 12433/86) (1992) 15 EHRR 173 the conviction was only to some extent (rather than solely or decisively) based on notes and transcripts of conversations with the defendant produced by an undercover agent whose activities, although supervised by an investigating magistrate were, the defendant claimed, illegal. The trial court refused to summon the undercover officer to give evidence. The case is of interest in that *Kostovski* and *Windisch* were viewed as distinguishable, because of the investigating judge's role and because the defendant knew the undercover officer by physical appearance, though not by his real identity. Although there was a violation (because the defendant and his counsel had had no opportunity to question the officer or cast doubt on his credibility), the court said (para 49):

> "Yet it would have been possible to do this in a way which took into account the legitimate interest of the police authorities in a drug trafficking case in preserving the anonymity of their agent, so that they could protect him and also make use of him again in the future."

This passage from *Lüdi* is consistent with the later statement in *Doorson* that the Strasbourg Court does not set its face absolutely against the admission of anonymous evidence in all circumstances.

83. That this is so is further confirmed by the Strasbourg Court's finding that an application made in the case of *Murphy* (sub nom *X v United Kingdom)* was manifestly unfounded (Application No 20657/92) (1992) 15 EHRR CD 113. The Court said:

> "The defendant must be given an adequate and proper opportunity to challenge and question the witnesses against him [*Asch v Austria* (1991) 15 EHRR 597]. In the present case, the witnesses whose identity was not disclosed to the public or the accused, were present in court and could be seen by the judge and by the representatives of both prosecution and defence. The evidence itself concerned not the question of identification of the applicant (which evidence was given by police officers whose identity was not withheld), but merely the making of certain filmed and photographic evidence. It was accepted by the defence that the evidence did not implicate the applicant.
>
> Accordingly, given that the applicant was able, through his representatives who could see the witnesses, to put all questions he wished to the witnesses in question, and that, far from being the only item of evidence on which the trial court based its decision to convict, the evidence in question did not implicate the applicant at all, the Commission finds no indication that the decision to screen witnesses from the applicant interfered with his rights under either Article 6(1) or Article 6(3)(d) of the Convention."

84. Para 70 in *Doorson* (above) was quoted and set out in full in *Van Mechelen v The Netherlands* (Application Nos 21363/93, 21364/93, 21427/93 and 22056/93)) (1997) 25 EHRR 647. But the Court noted (paras. 52-53) that, if anonymity exists, "the defence will be faced with difficulties which criminal proceedings should not normally involve" and that article 6(1) and 6(3)(d) accordingly require "that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities". The same message was reiterated by the Court in *Birutis v. Lithuania* (Applications Nos 47698/99 and 48115/99) (unreported) 28 March 2002. In neither *Van Mechelen* nor *Birutis* had the necessary balance been maintained. In the former case anonymous police officer witnesses were interrogated before an investigating judge who wrote a detailed report, but this took place in the absence of the defendants and their lawyers, and their evidence was the only evidence positively identifying the defendants as the perpetrators of the attempted manslaughter and robbery of which they were convicted. Further, another witness, a civilian, gave evidence without anonymity and had not been at any time threatened. The Court evidently doubted the justification for any anonymity, contrasting *Doorson* as a case where the witnesses "had sufficient reason to believe

that he [the defendant] might resort to violence". It also pointed out that in *Doorson* the anonymous witnesses had been heard in the presence of counsel. Finally, it noted (however open to question though this may be in fact) that *Doorson* had proceeded on the basis that there had been other evidence identifying the defendant; in contrast, in *Van Mechelen* the defendants' conviction was based "to a decisive extent" on the anonymous statements (para 62). In *Birutis*, although the conviction was not based solely or to a decisive extent upon the anonymous evidence, the defendants had not been able to question such witnesses, and the courts had failed either to do so or to conduct a scrutiny of the manner and circumstances in which their statements, on which the courts relied, had been obtained. So in both cases there were violations of article 6.

85. *Kok v The Netherlands* (Application No 43149/98) Reports of Judgments and Decisions 2000-VI, p 597 provides an interesting contrast. Following a police raid leading to the discovery of a cache of arms, the police took a statement from an anonymous witness as to the delivery of the arms to the house (though the precise date of delivery was withheld). The investigating judge heard evidence satisfying her that the witness's desire for anonymity was based on well-founded fear. She heard and saw the witness's evidence direct, and then decided which answers could be relayed, with voice distortion, to the prosecutor and the applicant's counsel who were in another room. Defence counsel were able to submit questions to the witness. The applicant complained inter alia that the withholding of the precise date made it impossible to show an alibi. The Strasbourg Court was satisfied with the procedures. It was satisfied that, in contrast with *Van Mechelen*, the evidence was not based to a decisive extent on the anonymous witness. (The applicant was arrested with a loaded pistol, documents, keys and a mobile telephone found in an Audi car linked him to the house where the arms cache was seized, his fingerprints were found on dustbin liners used to package such arms and he had lied about not knowing the owner of the Audi car.) What is of greater interest about this case, is however, the Court's statement immediately after reaching these conclusions:

> "In the Court's view, in assessing whether the procedures involved in the questioning of the anonymous witness were sufficient to counterbalance the difficulties caused to the defence due weight must be given to the above conclusion that the anonymous testimony was not in any respect decisive for the conviction of the applicant. The defence was thus handicapped to a much lesser degree."

86. This statement of principle may be read as suggesting that the extent of any handicap and the extent to which anonymous evidence is decisive are not separate, but inter-related, aspects of a single overall question, viz whether the trial was "fair".

87. This statement of principle has also been quoted in more recent cases. In *Visser v The Netherlands* at paras 45-46, the Court first cited a line of authority, including *Asch v Austria* (Application No 12398/86) (1991) 15 EHRR 597, *Saïdi v France* (Application No 14647/89) (1993) 17 EHRR 251, *PS v Germany*, para 24 and *Lucà v Italy* (para 40, quoted below), for the proposition that reliance on testimony (in those cases of identified witnesses) not adduced before the trial court only required the possibility of cross-examination where such testimony played a main or decisive role in securing the conviction. The Court in *Visser* then cited the statement quoted above from *Kok*. The Court's reliance, in a case concerning anonymous evidence, on principles governing the use of out of court statements by *identified* witnesses, coupled with the citation from *Kok*, again suggests that, even in relation to anonymous evidence, there may be no absolute requirement that such evidence should not be the sole or decisive factor in conviction. On the facts, the Court in *Visser* concluded both that the need for anonymity had not been made out and "in addition" that the conviction was based to a decisive extent on the anonymous testimony. On this basis, it was not necessary to examine whether the procedures had sufficiently counterbalanced the difficulties faced by the defence.

88. More recently, the Court in *Krasniki v Czech Republic* (Application No 51277/99) (unreported) 28 February 2006 not only quoted in para 76 of its judgment from *Doorson* and *Van Mechelen* (see para 79 above), but went on in paras 78-79 to repeat what it had said in *Visser* at paras 45-46. Again this may be read as an indication that there are circumstances in which even decisive testimony may be given anonymously. In *Krasniki* the conviction for unauthorised production and possession of drugs was based on evidence from two anonymous witnesses, in the form of statements taken at pre-trial proceedings in the presence of the defendant's lawyer who had had the opportunity to question such witnesses, and in the case of one of such witnesses in the form also of evidence given orally at trial with the witness outside the courtroom and out of sight of the defendant and his counsel who were however able to put questions to the witness through the judge. The Court was not satisfied that the need for anonymity had been sufficiently examined, and also observed that the conviction had been based at least to a decisive extent on the anonymous testimonies.

89. In his submissions for the Crown Mr Perry QC suggested that any requirement that anonymous evidence should not be the sole or decisive basis for conviction derived from the authorities on pre-trial statements by (identified) witnesses who were not called for cross-examination at trial. That submission derives possible support from the citation in *Kok, Visser* and *Krasniki* of authorities which deal with that subject matter, rather than with anonymous witnesses. But it does not mean that a similar principle is inappropriate in relation to anonymous witnesses who are available for such cross-examination as is possible at trial. Whatever its origin, the requirement has been deployed without drawing this distinction, which is probably less real in those civil law countries with procedures involving use of an investigating magistrate than it is in the United Kingdom. Further, in *Krasniki* the requirement was applied to one anonymous witness who was called at trial. It is considerably less certain, for the reasons I have mentioned in paragraphs 84 to 86 above, 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.

90. The position regarding the use at trial of pre-trial statements by identified witnesses is worth brief further consideration. The Strasbourg Court summarised the legal position in *Lucà v Italy* (Application No 33354/96) (2001) 36 EHRR 807 in these terms:

> "40. As the Court has stated on a number of occasions (see, among other authorities, *Isgrò v Italy*, judgment of 19 February 1991, Series A no 194-A, p 12, para 34, and *Lüdi* (1992) 15 EHRR 173, para 47), it may prove necessary in certain circumstances to refer to depositions made during the investigative stage (in particular, where a witness refuses to repeat his deposition in public owing to fears for his safety, a not infrequent occurrence in trials concerning Mafia-type organisations). If the defendant has been given an adequate and proper opportunity to challenge the depositions, either when made or at a later stage, their admission in evidence will not in itself contravene article 6(1) and (3) (d). The corollary of that, however, is that where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the

> investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by article 6 (see *Unterpertinger v Austria* (1991) 13 EHRR 175, paras 31-33; *Saïdi v France* (1993) 17 EHRR 251, paras 43-44; and *Van Mechelen v The Netherlands* para 55; see also *Dorigo v Italy*, application no 33286/96, Commission's report of 9 September 1998, para 43, unpublished, and, on the same case, Committee of Ministers Resolution DH (99) 258 of 15 April 1999)."

However, two English Court of Appeal cases, *R v M(KJ)* [2003] EWCA Crim 357, [2003] 2 Cr App R 322, para 59 and *R v Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257 have doubted whether this mean's that it would always be in violation of article 6 to admit written statements as evidence under the relevant provisions of (at that time) the Criminal Justice Act 1988 from witnesses who, it had been shown, could not be called or cross-examined because they could not be traced or had been kept away by intimidation by the defendant. The Court of Appeal deployed a similar rationale to that deployed in *Lord Morley's case*, *Reynolds v United States* and *Crawford v Washington* (see para 68 above) – the defendant could not benefit from his own established wrongdoing. That, if accepted, is a qualification that does not bear directly on the present case where the evidence in question was adduced anonymously and the appellant was not established to have brought about the witnesses' fear by intimidation. But the two Court of Appeal cases may serve as a caution against treating the Convention, or apparently general statements by the Strasbourg Court in different contexts, as containing absolutely inflexible rules.

The position in International Criminal Courts

91. It is also relevant to consider the framework governing and the case-law generated by the activities of international courts established under the aegis of the United Nations. The framework, common to the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court, consists in a statute supplemented by detailed rules. Detailed consideration has been given to both in case-law of the first of these Tribunals, notably in decisions in *Prosecutor v Tadic* (10 August 1995) and *Prosecutor v Blaskic* [1996] IT-95-14 (5 November 1996). In the former case, the Tribunal by a majority of two to one allowed a number of witnesses to give anonymous testimony. Judge Sir Ninian

Stephen, dissenting, concluded, after reviewing the case-law of the European Court of Human Rights (particularly *Kostovski*) at that date as well as that of United States, Victorian and United Kingdom courts, that the Tribunal's statute "does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused specified in Article 21". The rights under Article 21 included the right to a fair trial, the presumption of innocence, the right to minimum guarantees, including the right to trial in his presence, to defend himself in person or through legal assistance, and to examine or have examined the witnesses against him and examination of witnesses on his behalf under the same conditions). Judge Stephen went on to conclude that the rules also "give no support for anonymity of witnesses at the expense of fairness of the trial and the rights of the accused spelt out in Article 21".

92. However Judge Stephen was not thereby excluding anonymity in all situations. Citing *Jarvie v Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84, he accepted that, where an accused had known the witness in the past, but only under an assumed name (as in the case of an under-cover police witness) "in that case what justice may require, when protection of witnesses is important, is that only the false name should be revealed". In *Jarvie* Brooking J, giving the judgment of the court, had said that the identity of a witness could not be withheld "if there is good reason to think that disclosure may be of substantial assistance to the defendant in combating the case for the prosecution". A second category of anonymity which Judge Stephen was prepared to accept in principle was "where a witness has been a mere chance observer who is not known to the accused by any name or at all, having had no direct contact with him but having seen occurrences involving the accused to which he can testify". Judge Stephen was prepared to go this far, noting that "Such non-disclosure may, it is true, impede or perhaps prevent enquiries as to past history of these witnesses, which might go to credit, but it will not obstruct cross-examination as to the matters observed by them and of which they give evidence" This category is not far from *Murphy*, but it goes further, because in *Murphy* the witnesses were producing hard, unobjectively unassailable film evidence, rather than giving oral evidence open in any realistic sense to cross-examination as to creditworthiness.

93. Judge Stephen's dissent received retrospective support, when during the trial in *Tadic* the identity of one of the anonymous witnesses was eventually discovered by the defence. The witness had asserted that he had seen Mr Tadic execute 30 males including the witness's own father. After managing to identify the witness, the defence were able to produce his father, still alive, and only then did the witness admit that he

had been trained by Bosnian Government authorities to give his evidence against Mr Tadic.

94. In *Blaskic* the Tribunal agreed with Judge Stephen rather than the majority in *Tadic*, and in particular with his conclusion that nothing in the rules supported anonymity of witnesses at the expense of fairness of the trial. However, it added a lengthy coda in which it made clear that it too was not excluding absolutely the possibility of anonymity in all circumstances. It said that, in principle the rights of the defence "take precedence, but the protection of witnesses will at times also claim its right, loud and clear" (para 39) and that "achieving this balance is a delicate operation" (para 40). It went on to underline that, for anonymity to be granted, there must not only be real fear for the safety of the witness or his family, but also proof to the Tribunal's satisfaction of the importance of the evidence, the absence of any prima facie evidence of untrustworthiness and the absence of any available witness protection programme and of the need for anonymity rather than any less restrictive measures. In practice, there appears to have been no case in which any of the relevant Tribunals has granted anonymity applying these criteria, although it is not known when or how many applications for anonymity may subsequently have been made.

95. Despite references made to *Kostovski*, the criteria accepted by the International Criminal Tribunal for the Former Yugloslavia suggest, at least in principle, a flexible approach, free at least of any absolute requirement that anonymous testimony should not be the sole or decisive evidence against a defendant. The two cases of *Tadic* and *Blaskic* were of course decided before the Strasbourg Court had in *Doorson*, *Van Mechelen* and *Visser* spelled out that requirement separately. But, as I have noted in paras 84 to 87 above, the Strasbourg case-law may itself prove to have a greater flexibility than some of the dicta used in them would suggest.

Conclusion on the present facts

96. Whatever may be the position in that regard, I do not believe that the Strasbourg Court would accept that the use of anonymous evidence in the present case satisfied the requirements of article 6. Not only was the evidence on any view the sole or decisive basis on which alone the defendant could have been convicted, but effective cross-examination in the present case depended upon investigating the potential motives for the three witnesses giving what the defence maintained was a lying and

presumably conspiratorial account. Cross-examination was hampered by the witnesses' anonymity, by the mechanical distortion of their voices and by their giving evidence from behind screens, so that the appellant (and, since he was not prepared to put himself in a position where he had information that his client did not, his counsel) could not see the witnesses. Assuming that the sole or decisive nature of the evidence is not itself fatal, it is on any view an important factor which would require to be very clearly counter-balanced by other factors. Here there are none. The other factors are here very prejudicial in their impact on effective cross-examination.

97. So, if the matter rested with the Strasbourg jurisprudence, I would allow the appeal. However, on the basis that there is in the present Strasbourg jurisprudence nothing that requires states in their national law to balance anonymity against defendants' rights, the primary question is whether English domestic law permits anonymous evidence in any circumstances. I am prepared to accept that there is a limited flexibility in exceptional circumstances such as those of *Murphy* discussed in para 73 above. In *Murphy* the judge could be sure to the necessary high standard that the witness was not in any realistic sense implicating the accused, and that there was no issue of credibility to which relevant cross-examination could have been directed if the witnesses' identity had been known to the defendant. Another example of exceptional circumstances might be suggested to be the undercover officer who has met and dealt with an accused under a pseudonym. But the difficulty about accepting that would be that it would leave it to the judge, prosecution and police to investigate and decide whether any concerns existed about the officer's record and reliability; the defence would be precluded from knowing or asking questions disclosing the officer's true identity and background; and it would become difficult to draw the line between this and more radical in roads into the basic common law rule.

98. In this situation, I have been persuaded that any further relaxation of the basic common law rule, requiring witnesses on issues in dispute to be identified and cross-examined with knowledge of their identity and permitting the defence to know and put to witnesses otherwise admissible and relevant questions about their identity, is one for Parliament to endorse and delimit and not for the courts to create. Parliamentary legislation is the means by which common law principles regarding the admission of documentary evidence have been modified, and it is also the way in which New Zealand and Netherlands law were altered to meet the undoubted - and there is reason to think growing - threat to the administration of justice posed by witness intimidation. It

may well be appropriate that there should be a careful statutory modification of basic common law principles. It is clear from the Strasbourg jurisprudence discussed in this judgment that there is scope within the Human Rights Convention for such modification. I would allow this appeal accordingly.