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Select Committee on the Constitution

9th Report of Session 2007–08

Criminal Evidence (Witness Anonymity) Bill

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Criminal Evidence (Witness Anonymity) Bill

Introduction

1. The Committee's terms of reference are "to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution." In discharging the first part of our remit, our approach is to apply the test of whether a bill raises issues of principle affecting a principal part of the constitution. **The Criminal Evidence (Witness Anonymity) Bill raises points of constitutional significance, which we draw to the attention of the House.**

The Davis trial and appeal

2. This emergency Bill is prompted by the ruling of the Appellate Committee of the House of Lords in *R v Davis* [2008] UKHL 36 on 18 June 2008. Davis stood trial for a double murder at a party in London: a single shot killed two men. Three witnesses said they saw Davis fire the shot. They and other witnesses told the police that they feared for their lives if it became known that they had given evidence against Davis. There was no finding in this case that Davis, or any person acting on his behalf, had sought to intimidate the witnesses. The trial judge made an order to the following effect:
 - (a) The witnesses were each to give evidence under a pseudonym.
 - (b) The addresses and personal details, and any particulars which might identify the witnesses, were to be withheld from Davis and his legal advisers.
 - (c) Davis' counsel was permitted to ask the witnesses no question which might enable any of them to be identified.
 - (d) The witnesses were to give evidence behind screens so that they could be seen by the judge and the jury but not by Davis. Davis' counsel also submitted to this restriction.
 - (e) The witnesses' natural voices were to be heard by the judge and the jury but were to be heard by Davis and his counsel subject to mechanical distortion so as to prevent recognition by Davis.

It was part of Davis' defence that he was the victim of a corrupt plot by a former girlfriend to implicate him in the killings. Under the terms of the judge's anonymity order, a female witness giving evidence declined to answer questions which might have revealed her identity. As a result, Davis' counsel could not establish whether she was the former girlfriend and pursue questions about her motives for giving evidence.

3. Counsel for Davis submitted that, taken together, the witness anonymity restrictions prevented a fair trial. They were, he argued, contrary to the common law of England and breached Article 6(3)(d) of the European

Convention on Human Rights.¹ The Court of Appeal (Criminal Division) dismissed Davis’ appeal. Davis appealed to the Appellate Committee of the House of Lords, where the submissions were accepted. Lord Bingham of Cornhill held that “A trial so conducted cannot be regarded as meeting ordinary standards of fairness”.²

The common law right to be confronted by named and identified accusers

4. With the coming into force of the Human Rights Act 1998, there has been a tendency to emphasise the Convention rights incorporated into our law as an exhaustive catalogue of people’s fundamental freedoms and rights. This is not the case. For centuries, the British judiciary have, developing the common law in a principled way according to the doctrine of precedent, identified and protected a whole range of basic liberties and rights. Writing in 1914, Professor Albert Venn Dicey emphasised that this was, for the British, an essential element of the constitutional principle of the rule of law. He said:

“the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.”³

In Appendix 1 below we set out examples of the rights of a constitutional character that are recognised and protected by the common law. The principle of parliamentary supremacy in the United Kingdom permits an Act of Parliament to limit, modify or abolish any rule of common law, including those which protect basic liberties and rights.

5. The common law of England and Wales, of Northern Ireland and of Scotland has for many centuries recognised a right for a defendant in a criminal trial to be confronted by his named and identified accusers—i.e. witnesses giving sole or decisive evidence pointing to the defendant’s guilt—in order that he may cross-examine them and challenge their evidence. Clause 5(2)(a) of the Bill recognises this, referring to “the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings”.
6. In his speech in *Davis*, Lord Bingham emphasised the constitutional nature of the long-standing common law right in English law for defendants in criminal trials to be confronted by named and identified accusers. Lord Bingham explained how this right was adopted within the constitutions of several of the North American colonies and that the Sixth Amendment to the Constitution of the United States of America adopted in 1791—inspired by English common law—provides that “in all criminal prosecutions, the

¹ “Everyone charged with a criminal offence has the following minimum rights ... to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

² *R v Davis* [2008] UKHL 36 paragraph 32.

³ *Introduction to the Study of the Law of the Constitution* (8th edn, 1914).

accused shall enjoy the right ... to be confronted with the witnesses against him”.⁴

7. Lord Bingham recalled in relation to Northern Ireland how committees chaired by Lord Diplock (in 1972)⁵ and Lord Gardiner (in 1975)⁶ conclusively rejected suggestions that witness anonymity might be introduced to deal with the problems of intimidation that existed at that time.⁷ Lord Rodger of Earlsferry noted that “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”.⁸
8. **The right to be confronted by named and identified accusers is a right of a constitutional character. The Bill does not abolish this long-standing right but it will create a new range of statutory rules permitting witnesses anonymity.**

Rules permitting witness anonymity qualifying the right to be confronted with named and identified accusers

9. A distinction needs to be drawn between the general **right** of a defendant in a criminal trial to be confronted by his accusers and the **rules** which allow, in limited circumstances, the identity of a witness to be withheld provided that this would not prevent a fair trial.

Common law rules

10. In *R v Davis*, the Appellate Committee held that in a small number of “remarkably recent”⁹ cases (since the early 1990s), the common law has been developed to permit “a limited qualification on the right to know the identity of the prosecution witnesses”¹⁰ in “rare and exceptional circumstances”¹¹ where there is “a clear case of necessity”.¹² The small qualifications to the general right were developed by the courts exercising their common law power—often referred to as their ‘inherent jurisdiction’—to control their own proceedings. Reviewing the cases in which the courts had permitted anonymity in recent years, the Law Lords pronounced as follows.
 - (a) Lord Bingham held that “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.”¹³
 - (b) Lord Brown of Eaton-under-Heywood expressed the view that the anonymity order approved by the Northern Ireland Court of Appeal

⁴ *R v Davis* [2008] UKHL 36 paragraph 5.

⁵ Northern Ireland Office, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cm 5185).

⁶ Northern Ireland Office, *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* (Cm 5847).

⁷ *R v Davis* [2008] UKHL 36 paragraph 6.

⁸ *Ibid*, paragraph 44.

⁹ Lord Rodger of Earlsferry [2008] UKHL 36 paragraph 40.

¹⁰ Lord Mance [2008] UKHL 36 paragraph 73.

¹¹ Lord Bingham [2008] UKHL 36 paragraph 16 (referring to Lord Hutton’s speech in *R (on the application of Al-Fawwaz) v Governor of Brixton Prison* [2001] UKHL 69, paragraph 86).

¹² Lord Carswell [2008] UKHL 36 paragraph 59.

¹³ *Ibid*, paragraph 29.

in *R v Murphy* [1990] NI 306 came “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”.¹⁴ In that case, television cameramen who had filmed the scene of the killing of two British army corporals were not referred to by name in court and they were screened so that the defendants and the public were unable to see their faces. Their credibility was not in issue, they were not providing personal identification evidence of the defendants and there was no necessity to inquire into their background and motives.

- (c) Lord Mance agreed, saying 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”.¹⁵
 - (d) Lord Rodger of Earlsferry held that, for the purposes of determining Davis’ appeal, it was unnecessary to decide whether *R v Murphy* is consistent with the common law as it was clear that Davis’ trial failed to meet the minimum standards of fairness required by Article 6 of the ECHR.¹⁶
 - (e) Lord Carswell, concurring that the particular anonymity measures in the Davis trial made the conviction unsafe, sought to distil a series of propositions from the case law that went further in permitting anonymity orders as a matter of common law than the other Law Lords were prepared to subscribe to. These included: that “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”; that the more measures the court might consider adopting—such as withholding names and addresses, screening, voice modulation—“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”; and “an important consideration is the relative importance of the witness’s testimony in the prosecution case”.¹⁷
11. The practical effect of the *Davis* judgment is to clarify and prevent any further broadening of the courts’ common law powers to order anonymity. The protective measures ordered in the Davis trial were a step too far in the particular context of that case.
12. The Appellate Committee recognised that any changes to the rules governing anonymity would require legislation rather than developments through the common law. Lord Bingham said that the problem of witness intimidation was a serious one that “may very well call for urgent attention by Parliament”.¹⁸ Lord Rodger of Earlsferry suggested that witness protection schemes and the like were the best way of dealing with the problem of intimidation—changing the law on anonymity would only be “second best”

¹⁴ Ibid, paragraph 65.

¹⁵ Ibid, paragraph 73.

¹⁶ Ibid, paragraph 44.

¹⁷ Ibid, paragraph 59.

¹⁸ Ibid, paragraph 27.

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”.¹⁹ Finally, Lord Mance stated that any further relaxation of the basic common law rule “is one for Parliament to endorse and delimit and not for the courts to create”.²⁰

Statutory rules substituted

13. The Bill will abolish the “the common law rules relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld” (clause 1(2)). Under clause 3 of the Bill, either the prosecutor or the defendant may apply to the court for a witness anonymity order. Clause 4 requires a trial judge to be satisfied about three conditions before making an order: (A) the necessity of making an order to protect personal safety, prevent serious damage to property or “to prevent real harm to the public interest”; (B) that in all the circumstances the measures will be consistent with the defendant receiving a fair trial; and (C) that the interests of justice require the witness to testify and that the witness will not testify if an order is not made.
14. Although it is not spelt out on the face of the Bill, it is axiomatic that any order made must not violate a defendant’s right to a fair trial under Article 6 of the European Convention on Human Rights. The court is a ‘public authority’ for the purposes of the Human Rights Act 1998. It is noteworthy that in *R v Davis* the Appellate Committee held that the combination of anonymity measures imposed by the trial judge in that particular case breached the defendant’s Convention rights.
15. **The new statutory rules on witness anonymity introduced by the Bill are broader than the existing common law rules. Whereas the common law powers on witness anonymity appear to be limited to protecting personal safety, the Bill will enable anonymity orders to be made where this is necessary to protect serious damage to property and “real harm to the public interest”. This broadening of the rules, along with the existence of a much-publicised statutory scheme, may lead to greater use of witness anonymity. Article 6 of the ECHR will however continue to provide the minimum guarantees of a fair trial. In this context it is important to note that the Appellate Committee in *Davis* held that the protective measures imposed in that particular case breached the right to a fair trial as well as the common law limits on anonymity.**

Retrospective legislation

16. Clause 12 of the Bill is designed to prevent appeals on the ground that in a trial concluded before the Bill comes into force a court had purportedly exercised common law powers to make an order protecting the anonymity of a witness. The Appellate Committee in *Davis* made plain that such powers are very limited; it is, however, possible that in the past some trial judges have taken a more expansive—and in the light of the *Davis* ruling, erroneous—view of what was permissible. Under clause 12, the fact that a judge imposed witness anonymity orders in circumstances when there was no

¹⁹ Ibid, paragraph 45.

²⁰ Ibid, paragraph 98.

common law power to do so will not be a ground of appeal; but the Court of Appeal must treat a conviction as unsafe if what was done in the trial (purportedly under common law powers) exceeded the new statutory powers and the defendant did not receive a fair trial as a result of the anonymity accorded to the witness(es).

17. Legislation to make lawful an action that was done without legal authority (here, a court exceeding its common law powers in making provision for witness anonymity) needs to be scrutinised carefully. Retrospective legislation of this ‘curative’ type, which seeks to ratify past official or judicial conduct, has the potential to undermine the constitutional principle of the rule of law under which public authorities, including the courts, must have positive legal authority for their actions. That said, there is in our view no general prohibition on retrospective legislation in British constitutional law or practice. The use of parliamentary supremacy to give a legal basis to an action done without lawful authority may in some circumstances be justifiable.²¹
18. **We consider that as a matter of British constitutional practice, there is an acceptable basis for the provision in clause 12 barring appeals succeeding on the sole ground that a court before the commencement of the Criminal Evidence (Witness Anonymity) Bill lacked legal power to impose an order for witness anonymity. The public interest outweighs a defendant’s interest in benefiting from a past defect in the trial process given that there is an express requirement for the appeal court to consider whether, overall, the trial was fair.**

Emergency legislation and ‘sunset clauses’

19. This is the third emergency bill to be introduced in recent months; it follows the Banking (Special Provisions) Bill in February 2008 and the Northern Ireland (St Andrews Agreement) (No.2) Bill in March 2007. **While we accept that from time to time exceptional circumstances may arise requiring the Government to prepare, and Parliament to deliberate on, a bill according to an expedited timetable there are obvious risks, especially where the bill deals with a complex social and legal problem. We may consider this issue further in a future inquiry into the legislative process.**
20. The Secretary of State for Justice and Lord Chancellor told the House of Commons that he was giving an “undertaking of what amounts to a sunset clause” in respect of the Criminal Evidence (Witness Anonymity) Bill, because the Law Reform, Victims and Witnesses Bill—which is planned for next Session—will cover the issue of witness anonymity.²² Lord Hunt of Kings Heath assured the House of Lords that the Secretary of State for Justice and Lord Chancellor “would be happy to discuss with opposition parties the question of how to ensure that the principle of the sunset clause is taken into account without it necessarily appearing in statute”.²³ These

²¹ See e.g. Sir Carleton Kemp Allen, *Law in the Making* (5th edn Oxford) p 444 (“there may be occasions when public exigency compels a departure from the general principle, and it is impossible therefore to say that retrospective legislation is in all the circumstances unjustifiable”).

²² HC Deb 26 June 2008 col 516. A ‘sunset clause’ provides that provisions in an Act of Parliament cease to have effect after a stipulated period. A variant on this is a clause that provides for provisions to cease to have effect after a stipulated period unless Parliament by order approves an extension for a further specified period.

²³ HL Deb 26 June 2008 col 1603.

ministerial undertakings would not, in our view, have been a satisfactory guarantee that the provisions of the Bill would be an interim solution pending consultation by the Government and deliberation by Parliament.

21. Subsequently, however, the Secretary of State and Lord Chancellor tabled an amendment to the Bill which provided that no witness anonymity order could be made under the Bill after 31 December 2009. Having an explicit sunset clause of this kind on the face Bill is, we believe, a far more satisfactory guarantee than the ministerial assurances mentioned above.
22. **We welcome the introduction of a sunset clause to the Bill and the Government's intention that Parliament will have an opportunity to return to consider witness anonymity in the Law Reform, Victims and Witnesses Bill planned for the next Session.**
23. There is a more general point. The type of situation that has arisen in relation to the Criminal Evidence (Witness Anonymity) Bill is not unique and is likely to recur. One of the beneficial outcomes of the Government's decision in July 2007, as part of the Governance of Britain initiative, to publish a Draft Legislative Programme some months ahead of the Queen's Speech is that it is now clear when a bill in the current Session deals with matters that are planned for the next Session. This is so, for example, in relation to provisions on coroners contained in Part 6 of the Counter-Terrorism Bill this Session. The Government has explained that these measures cannot wait until the enactment of the Coroners and Death Certification Bill planned for the 2008–09 Session as there are a number of pending inquests where new powers are urgently required. **We see merit in adopting a general practice of including a sunset clause for provisions that are introduced for reasons of expediency in one Session ahead of a bill on the same subject that has been announced as part of the Draft Legislative Programme for a subsequent Session.**

Media coverage of the Davis appeal

24. In our report *Relations between the executive, the judiciary and Parliament*, we said:

“Given their important role in shaping attitudes towards the judiciary and the justice system, the media have a duty to report proceedings accurately and fairly. However, certain sections of the media might be said to abuse this position of responsibility by attacking individual judges or the judiciary as a whole for carrying out their obligations”.²⁴
25. The judgment of the Appellate Committee in the *Davis* case naturally prompted interest in the news media. While most of the coverage was accurate and informative, some journalists and sub-editors in the tabloid press sought to sensationalise the judgment by disparaging the judiciary.²⁵ **We deprecate misrepresentations of the Appellate Committee's role and the Davis judgment.**

²⁴ 6th Report (2006–07), HL 151, paragraph 145.

²⁵ e.g. Mike Sullivan (Crime Editor), “Anarchy is unleashed”, *The Sun*, 25 June 2008 (“Barmy Law Lords were last night accused of unleashing anarchy by barring anonymous witnesses in court trials. Worried police warned that dozens of terrorists and murders will walk free unless the judges' ruling is swiftly overturned by the Government. They fear Britain could witness unrestrained violence like the slaughter in Zimbabwe”). Ross Kaniuk, “Chaos in court as loony Lords spike £6m trial”, *Star*, 25 June 2008—a disparaging headline marring an otherwise fair account of the issues at stake.

APPENDIX: ILLUSTRATIONS OF RIGHTS RECOGNISED AND PROTECTED BY THE COMMON LAW

Right	Examples of leading cases
Right to life	<i>R v Secretary of State for the Home Department Ex parte Bugdaycay</i> [1987] AC 514
Liberty of the person	<i>Bowditch v Balchin</i> (1850) 5 Exch 378; <i>R v Thames Magistrate Ex parte Brindle</i> [1975] 1 WLR 1400
Justice in public	<i>Scott v Scott</i> [1913] AC 417
Prohibition on the retrospective imposition of criminal penalty	<i>Pierson v Secretary of State for the Home Department</i> [1998] AC 539
Right to a fair hearing	<i>R (on the application of McCann) v Manchester Crown Court</i> [2002] UKHL 39
Access to legal advice and to communicate confidentially with a legal adviser	<i>R v Secretary of State for the Home Department Ex parte Daly</i> [2001] UKHL 26
Freedom of expression	<i>Pierson v Secretary of State for the Home Department</i> [1998] AC 539; <i>R v Secretary of State for the Home Department Ex parte Simms</i> [2000] 2 AC 115; <i>Derbyshire County Council v Times Newspapers Ltd</i> [1993] AC 534
Limitations on searches of premises and seizure of documents	<i>Marcel v Commissioner of Police</i> [1992] Ch 225
Prohibition of the use of evidence obtained by torture	<i>A v Secretary of State for the Home Department</i> [2005] UKHL 71
Right of a British citizen to live in and return to the part of the Queen's territory of which he is a citizen	<i>R v Secretary of State for the Foreign and Commonwealth Office Ex parte Bancoult</i> [2001] QB 1067
Prohibition of deprivation of rights without compensation	<i>Hall v Shoreham-by-Sea UDC</i> [1964] 1 WLR 240
Privilege against self-incrimination	<i>W v P</i> [2006] EWHC 1226 (Ch)
A duty on the State to provide subsistence to asylum-seekers	<i>R v Secretary of State for Social Security Ex parte Joint Council for the Welfare of Immigrants</i> [1997] 1 WLR 275
Freedom of movement within the United Kingdom	<i>R v Secretary of State for the Home Department Ex parte McQuillan</i> [1995] 4 All ER 400

Source: adapted from H. Woolf, J. Jowell and A. Le Sueur, *de Smith's Judicial Review* (London: Sweet & Maxwell, 2007), chapter 5.

Key:

AC = Appeal Cases published by the Incorporated Council of Law Reporting (ICLR)

QB = Queen's Bench Reports published by ICLR

WLR = Weekly Law Reports published by ICLR

All ER = All England Reports published by LexisNexis Butterworths

UKHL = official citation for House of Lords judgments