Michaelmas Term
[2009] UKSC 14
On appeal from: [2009] EWCA Crim 964

JUDGMENT

R *v* Horncastle and others (Appellants) (on appeal from the Court of Appeal Criminal Division)

before

Lord Phillips, President
Lady Hale
Lord Brown
Lord Mance
Lord Neuberger
Lord Kerr
Lord Judge

JUDGMENT GIVEN ON

9 December 2009

Heard on 7, 8 and 9 July 2009

Appellants (Horncastle and Blackmore)	*Appellants (Marquis and Graham)*	*Respondent*
Tim Owen QC John Gibson Janet Reaney (Instructed by The Johnson Partnership Solicitors)	Shaun Smith QC James Beck (Instructed by The Johnson Partnership Solicitors)	David Perry QC Louis Mably (Instructed by Crown Prosecution Service)

LORD PHILLIPS, PRESIDENT

This is a judgment with which all members of the court agree.

Introduction

1. Each of the appellants has been convicted on indictment of a serious criminal offence. Each has had an appeal against conviction dismissed by the Court of Appeal. Each appeals on the ground that he did not receive a fair trial, contrary to article 6 of the European Convention on Human Rights ("article 6") ("The Convention"). The appeal of each is based on the fact that there was placed before the jury the statement of a witness who was not called to give evidence. In each case the witness was the victim of the alleged offence.

2. Mr Horncastle and Mr Blackmore were convicted of causing grievous bodily harm, with intent, to Mr Peter Rice. Mr Rice made a witness statement to the police about what had happened to him. He died before the trial of causes not attributable to the injuries that had been inflicted upon him. His statement was read at the trial. Although there was other evidence that supported it, the Court of Appeal concluded that the statement was "to a decisive degree" the basis upon which the appellants were convicted.

3. Mr Marquis and Mr Graham were convicted of kidnapping a young woman called Hannah Miles. She made a witness statement to the police in which she described what happened to her. The day before the appellants' trial she ran away because she was too frightened to give evidence. Her statement was read to the jury. A considerable body of oral evidence was also given at the trial. The Court of Appeal held that the appellants' convictions did not rest on the evidence of Miss Miles "to a decisive extent". The appellants challenge that finding.

4. Mr Rice's witness statement was admitted pursuant to section 116(1) and (2)(a) of the Criminal Justice Act 2003 ("the CJA 2003"), which makes admissible, subject to conditions, the statement of a witness who cannot give evidence because he has died. Miss Miles' witness statement was admitted pursuant to section 116(1) and (2)(e) of the CJA 2003, which makes admissible, subject to conditions, the statement of a witness who is unavailable to give evidence because of fear.

5. The principal issue raised by these appeals is whether a conviction based "solely or to a decisive extent" on the statement of a witness whom the defendant has had no

chance of cross-examining necessarily infringes the defendant's right to a fair trial under articles 6(1) and 6(3)(d) which provide:

> "(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law….
>
> . . .
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
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> . . .
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

6. The appellants submit that an affirmative answer must be given to this principal issue. In each case it is submitted that the trial judge should have refused to admit the statement on the ground that it was a decisive element in the case against the appellants. This the judge could have done, either by "reading down" the relevant provisions of the 2003 Act so as to preclude the admission of hearsay evidence in such circumstances or by excluding it under section 78 of the Police and Criminal Evidence Act 1984 ("PACE").

7. In so submitting the appellants rely on a line of Strasbourg cases, culminating in the decision of the Fourth Section of the European Court of Human Rights ("the Chamber"), delivered on 20 January 2009, in the cases of *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1. In each of those applications statements had been admitted in evidence at a criminal trial of a witness who was not called to give evidence. The Strasbourg Court held that, in each case, the statement was "the sole or, at least, the decisive basis" for the applicant's conviction. The Court reviewed its own jurisprudence and concluded that this established that the rights of each applicant under articles 6(1) and 6(3)(d) had not been respected. The Court took as its starting point the following statement in *Lucà v Italy* (2001) 36 EHRR 807 at paragraph 40:

> "…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".

I shall call the test of fairness that this statement appears to require "the sole or decisive rule".

8. The Court of Appeal did not accept that the decision in *Al- Khawaja* was determinative of the results of these appeals. It held that, in the circumstances of each of the appeals, the appellants had received a fair trial and dismissed the appeals.

The approach to this appeal

9. Article 43(1) of the Convention provides that within a period of three months from the date of judgment of the Chamber any party may, in an exceptional case, request that the case be referred to the Grand Chamber. Article 43(2) provides that a Panel of 5 judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or its Protocols, or a serious issue of general importance. On 16 April 2009 the United Kingdom requested that the decision of the Chamber in *Al-Khawaja* be referred to the Grand Chamber. On 5 June 2009 the Panel of the Grand Chamber adjourned consideration of that request pending our judgment in the present case.

10. Mr Tim Owen QC, for Mr Horncastle and Mr Blackmore, submitted that we should treat the judgment of the Chamber in *Al-Khawaja* as determinative of the success of these appeals. He submitted that this was the appropriate response to the requirement of section 2(1) of the Human Rights Act 1998 that requires a court to "take into account" any judgment of the European Court of Human Rights in determining any question to which such judgment is relevant. He submitted that the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2009] 3 WLR 74 exemplified the correct approach to a decision of the European Court. In that case the Committee held itself bound to apply a clear statement of principle by the Grand Chamber in respect of the precise issue that was before the Committee. Mr Owen submitted that we should adopt precisely the same approach to the decision of the Chamber in *Al-Khawaja.*

11. I do not accept that submission. The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently

appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case.

The decision of the Court of Appeal

12. In recognition of the importance of these appeals for English criminal procedure the Criminal Division of the Court of Appeal sat five strong in a composition that included the Vice-President and other senior judges with extensive experience of the criminal process. The court was thus particularly well qualified to consider the questions at the heart of these appeals. These questions are: (i) whether the regime enacted by Parliament in relation to the admission of the evidence of an absent witness at a criminal trial will result in an unfair trial and, if not, (2) whether the Strasbourg jurisprudence none the less requires the court to apply that regime in a manner contrary to the intention of Parliament.

13. The Court of Appeal carried out an extensive survey of both domestic and Strasbourg jurisprudence. They concluded that the statutory regime produced a fair trial and that the Strasbourg jurisprudence did not require the court to apply that regime in a manner contrary to Parliament's intention. I endorse those conclusions and almost all the reasoning that led to them. I commend the Court of Appeal's judgment and shall, in places, borrow from it. This judgment should be read as complementary to that of the Court of Appeal, not as a substitute for it.

A summary of my conclusions

14. The following are the conclusions that I have reached for reasons that I shall develop:

> (1) Long before 1953 when the Convention came into force the common law had, by the hearsay rule, addressed that aspect of a fair trial that article 6(3)(d) was designed to ensure.
>
> (2) Parliament has since enacted exceptions to the hearsay rule that are required in the interests of justice. Those exceptions are not subject to the sole or decisive rule. The regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary.

(3) The continental procedure had not addressed that aspect of a fair trial that article 6(3)(d) was designed to ensure.

(4) The Strasbourg Court has recognised that exceptions to article 6(3)(d) are required in the interests of justice.

(5) The manner in which the Strasbourg Court has approved those exceptions has resulted in a jurisprudence that lacks clarity.

(6) The sole or decisive rule has been introduced into the Strasbourg jurisprudence without discussion of the principle underlying it or full consideration of whether there was justification for imposing the rule as an overriding principle applicable equally to the continental and common law jurisdictions.

(7) Although English law does not include the sole or decisive rule it would, in almost all cases, have reached the same result in those cases where the Strasbourg Court has invoked the rule.

(8) The sole or decisive rule would create severe practical difficulties if applied to English criminal procedure.

(9) *Al-Khawaja* does not establish that it is necessary to apply the sole or decisive rule in this jurisdiction.

The common law approach to a fair trial

15. The United Kingdom was the first country to ratify the Convention in 1951 and the Convention came into force in 1953. Since then the Strasbourg Court has repeatedly had to grapple in judgments relating to article 6 with the requirements of a fair trial. During the same period England and Wales and the Commonwealth countries that apply the common law have been involved in the same exercise, largely by means of legislation, as have the civil law jurisdictions which, in 1953, had a very different approach to the criminal process.

16. The English criminal process is adversarial. Its focal point is the trial, which is the judicial part of the process. The investigation into a crime is carried out by the executive, in the form of the police. The police under the supervision of the independent Crown Prosecution Service, which is responsible for ensuring the fairness, impartiality and integrity of the process, charge the defendant with the offence, prepare the case against him and seek to prove it at the trial. Rules have been laid down to protect the defendant against unfair treatment during the investigation and preparation for trial. These include the caution and the right of silence, the entitlement to legal representation, rules governing questioning by the police, an embargo on questioning a defendant after he has been charged and an entitlement to know the case against him.

17. Two underlying themes have marked the common law approach to a fair criminal trial. The first has been that the determination of guilt or innocence should be entrusted to a lay tribunal – the jury in the case of the more serious offences and the magistrates in most cases of less serious offences. The second has been a reluctance to trust the lay tribunal to attach the appropriate weight to the evidence placed before them. These themes have been reflected in the rules governing the trial process.

18. There are two principal objectives of a fair criminal trial. The first is that a defendant who is innocent should be acquitted. The second is that a defendant who is guilty should be convicted. The first objective is in the interests of the individual; the second is in the interests of the victim in particular and society in general. The two objectives are sometimes in tension and, where they are, the first carries more weight than the second.

19. English law has different kinds of rules that are designed to ensure a fair trial. Some relate to the procedure itself, such as the right of the defendant to be informed of the case against him, to be given any information available to the prosecution that is relevant to that case, to have legal assistance, to decline to answer questions, to be exempt from further questioning once charged with a crime, to be tried in public at a single continuous trial at which all the evidence has to be adduced, to be present at that trial to confront and cross-examine the witnesses who are called to give evidence, and to be informed of the identity of those witnesses.

20. Other rules relate to the evidence that can be placed before the tribunal, be it magistrates or a jury, which is to rule on the defendant's guilt. These are rules of "admissibility". Jury trials are presided over by a judge who acts as gatekeeper as to what is and what is not permitted to be placed before the jury as evidence. This is an important safeguard for the defendant. The basic principle is that only the "best" evidence is placed before the jury, that is, the evidence that is most likely to be reliable. In 1953 this principle rendered inadmissible almost all "hearsay" evidence. Hearsay evidence is any statement of fact other than one made, of his own knowledge, by a witness in the course of oral testimony. Hearsay evidence was inadmissible even if it was a past statement made by someone who was called to give oral evidence and who could be cross-examined about it. Furthermore, hearsay evidence was inadmissible, whether it assisted the prosecution or the defence.

21. There were two principal reasons for excluding hearsay evidence. The first was that it was potentially unreliable. It might even be fabricated by the witness giving evidence of what he alleged he had been told by another. Quite apart from this, the weight to be given to such evidence was less easy to appraise than that of evidence delivered by a witness face to face with the defendant and subject to testing by cross-examination.

22. The admissibility of some categories of evidence was excluded because, although the evidence was probative, it was thought that the jury could not be trusted not to give the evidence more weight than it deserved. Its probative value was outweighed by its potentially prejudicial effect. Such evidence included evidence of a defendant's previous bad character or criminal record and psychiatric evidence that suggested that the defendant might have a propensity to commit an offence of the type charged.

23. Rules governing the admissibility of evidence are important aspects of both criminal and civil procedure. They have generated lengthy text-books on the law of evidence. [I am not aware that the civil law systems have a comparable body of jurisprudence].

24. A third category of rules related to the reasoning permissible in arriving at a conclusion of guilt. Of these the most fundamental were, and are, first that a defendant is deemed to be innocent until proved to be guilty. The jury cannot convict simply upon suspicion of guilt. More fundamentally, a jury cannot convict even if they consider it more likely than not that the defendant is guilty. They can only convict if they are sure, or satisfied "beyond reasonable doubt" that the defendant is guilty. But there were many more directions that a judge was required to give to a jury in relation to the process of reasoning that was permitted, or not permitted, in reaching their verdict. These sometimes required the jury to disregard evidence that was probative of guilt in order to guard against the risk that the jury would attach too much weight to such evidence. Thus the trial judge had to tell the jury that no adverse inference could be drawn from the fact that a defendant had elected not to go into the witness box and, in the exceptional case where the jury learnt that a defendant was a man of bad character, they had to be instructed that this made it no more likely that he was guilty of the crime charged.

25. There were some circumstances in which common law or statute required the jury to be told either that they could not convict on the evidence of one witness alone unless this was corroborated, or that it would be dangerous for them to do so. This again reflected the perceived danger that a jury would give too much weight to certain categories of evidence.

26. While some of these rules were designed to guard against the risk of an innocent man being convicted, others also met the requirement of fairness that called for "equality of arms" in a procedure that was adversarial.

Exceptions to the rules

27. Over the past half century it was recognised that the application, without exception, of some of these rules placed an obstacle in arriving at the truth that could not be justified. Witness statements were prepared close to the time of the crime that contained detail that the witness might not remember when called to give evidence months later. In such cases the hearsay rule might be evaded by permitting the witness to "refresh his memory" from the statement. Sometimes the rule operated in a way that was prejudicial to the defendant. Thus the fact that another man had confessed to the crime of which the defendant was charged was inadmissible. In other circumstances the rule excluded evidence that was plainly more reliable than the oral testimony of the witness. While the "best evidence" rule might justify the hearsay rule in relation to a witness who was available to give evidence, if, for some reason such as death or illness, the witness was not able to give oral evidence, a statement made by that witness might be the best evidence available of what had occurred. Sometimes the application of the rules resulted in the acquittal of defendants who were manifestly guilty – see *Myers v Director of Public Prosecutions* [1965] AC 1001.

28. Over the years a host of exceptions were created by the judges or by statute to these rules, and particularly to the hearsay rule, aimed at addressing these problems. In relation to civil proceedings the hearsay rule was effectively abolished by the Civil Evidence Act 1968. In relation to the criminal law, less far reaching changes were made by the Criminal Evidence Act 1965 and the Police and Criminal Evidence Act 1984. But these also included the very important general safeguard in section 78(1) of the latter statute, which remains in force. This provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

29. More significant changes were made to the hearsay rule in criminal proceedings by the Criminal Justice Act 1988, but these have been replaced by provisions of the CJA 2003. These provisions largely implemented the recommendations of the Report of the Law Commission dated 4 April 1997 (Law Com No 245) on "Evidence in Criminal Proceedings: Hearsay and Related Topics". In 1995 the Law Commission had published a Consultation Paper on these topics, in response to a recommendation as to the need for reform made by a Royal Commission on Criminal Justice in 1993. As the Court of Appeal observed at paragraph 10, the consultation embraced judges, practitioners, academic lawyers and other experts and the code enacted pursuant to the Report was:

> "informed by experience accumulated over generations and represents the product of concentrated consideration by experts of how the balance should be struck between the many competing interests affected. It also represents democratically enacted legislation substantially endorsing the conclusions of the expert consideration."

30. The relevant provisions of the CJA 2003 have been summarised by the Court of Appeal at paragraphs 11 to 16 and I shall adopt that summary, subject to a small addition.

31. Hearsay is not made generally admissible by this statutory code. The scheme of the code is as follows:

(i) It preserves certain specified common law categories of admissible evidence (ss.114(1)(b) and 118).

(ii) It makes specific provision for a limited number of categories of hearsay where there is special reason to make it admissible (ss.114(1)(a) and (c), 116-117, 119-120 and 127-129).

(iii) It provides for a limited residual power to admit hearsay if the interests of justice require it (s.114(1)(d) and 114(2)).

(iv) It establishes special stipulations to which hearsay evidence is subject (ss.121-126).

32. Among the provisions of Part 11, Chapter 2 of the CJA 2003 in the second group are the following:

(i) by s.116(1) and (2)(a) the statement of a witness who is unavailable because he is dead is, subject to conditions, made admissible; similar provisions apply to a witness who is medically unfit, absent overseas and cannot be brought to the UK, or cannot despite all practicable efforts be found;

(ii) by s.116(1) and (2)(e) the statement of a witness who is unavailable because he does not give evidence through fear is, subject to conditions, made admissible;

(iii) by s.116(3) "fear" is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss. (This is the addition I have made to the Court of Appeal's summary);

(iv) by s.117 the contents of business records maintained by those who can be expected to have had personal knowledge of the matters recorded are, subject to conditions, made admissible.

33. In relation to a witness who is unavailable because he is dead (or unavailable for medical reasons or because he is abroad or missing), the conditions for admissibility are as follows:

(i) the evidence must be such as would be admissible if the witness were present to give it orally (s.116(1)(a)); and

(ii) the witness must be identified to the satisfaction of the court (s.116(1)(b)).

34. Those same conditions apply also to the case of a witness who does not give evidence through fear. In that case an important additional condition must be satisfied. The court must be persuaded to admit the evidence and it must do so only when satisfied that it ought to be admitted in the interests of justice. In deciding whether or not this is so, the court must have regard to all relevant circumstances, but in particular to:

(a) the contents of the statement;

(b) any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement in the absence of the maker);

(c) the possibility of alternative special measures for the protection of the witness, such as screens or video-transmitted evidence.

35. The statements of witnesses who are dead, ill, missing, or absent through fear are examples of hearsay made admissible because the evidence is otherwise unavailable. Other categories of hearsay are made admissible because, in the ordinary way, they are likely to be reliable. Business records are made admissible (by s.117 or, where a machine is involved, s.129) because, in the ordinary way, they are compiled by persons who are disinterested and, in the ordinary course of events, such statements are likely to be accurate; they are therefore admissible as evidence because *prima facie* they are reliable. So, to be admissible, it must be demonstrated that they are the product of information gathered by someone with personal knowledge of the matters recorded, and that anyone through whose hands they have passed has acted in the course of trade, business, profession or office (s.117(2)), and the court is not to admit them if there is doubt about their reliability (ss.117(6) and (7) and 129(1)). If the record was compiled for the purpose of the criminal proceedings, rather than simply in the usual course of business, there is an additional requirement that the source of the information be absent or will have no recollection of the material (s.117(5)): that is designed to ensure that if he can attend to give first-hand evidence he does so. S.127 (preparatory work done by the assistants to experts) is a further example of hearsay evidence which is *prima facie* reliable and which is admissible for either party; its admission is hedged with a similar safeguard providing for non-admission if the interests of justice point against it. S.128 (confessions by co-accused) is another example of hearsay made admissible (at the suit of the defendant) in the interests of fairness to the accused and because a confession is *prima facie*, in the absence of reason to the contrary, likely to be true; the CJA 2003 preserves a balance between the competing interests of co-accused by providing for exclusion unless it be

shown that the confession was not obtained by oppression or anything else likely to render it unreliable.

36. It follows that both in the case of unavailable witnesses, and in the case of apparently reliable hearsay, the CJA 2003 contains a crafted code intended to ensure that evidence is admitted only when it is fair that it should be. The CJA 2003 goes on, in the fourth group of its provisions, to lay down special stipulations applicable to all hearsay, designed to further the same end. They are as follows:

(i) S.124 makes special provision for the admissibility of any material which it is contended challenges the credibility of an absent witness. The opposing party is enabled to put in evidence anything which he could have put in if the witness had been present, but he may also put in material which, if the witness had been present, could only have been asked of him in cross-examination in circumstances where his answers would have been final; this puts the challenger to that extent in a better position than if the witness is present, and is designed to help to counterbalance the absence of cross-examination of the witness in person. In most cases also, in addition to the statutory rules, a defendant who is faced with hearsay evidence will be entitled to ask the court to call upon the Crown to investigate the credibility of any absent witness and to disclose anything capable of challenging it. That exercise will ordinarily require the Crown to go considerably beyond what would otherwise be the duty simply to disclose what is already in its possession and capable of undermining its case; it will require active investigation of the bona fides, associates and credibility of the witness, so as to provide the defendant with, in addition to anything he already knows, everything capable of being found which can be used to test the reliability of the absentee.

(ii) By s.125 the judge is required to stop any case depending wholly or partly on hearsay evidence if that evidence is unconvincing to the point where conviction would, in the judge's opinion, be unsafe; this is an important exception to the usual rule of the law of England and Wales that the assessment of the weight of evidence is exclusively for the jury (see *R v Galbraith* (1981) 1 WLR 1039).

(iii) S.126 preserves the general power of the judge (which existed at common law and is enshrined in s.78 of the Police and Criminal Evidence Act 1984) to exclude any evidence relied upon by the Crown (but not by a defendant) if its admission would have such an adverse effect on the fairness of the trial that it ought not to be admitted; the section adds a further obligation upon the judge to exclude hearsay evidence if its admission would generate satellite disputes which would cause an undue waste of time such as to outweigh the case for admitting it.

37. It is significant, as the Court of Appeal has pointed out, that the Law Commission gave special consideration to whether there should be a requirement that hearsay should not be capable of proving an essential element of an offence unless supported by other evidence. The Commission was persuaded by the responses to consultation that this would not be desirable. It would require a complex direction to the jury of a type that had proved unsatisfactory in relation to other circumstances where the jury used to be directed

to look for corroboration of evidence. The Commission concluded that the danger of a defendant being unfairly convicted on the basis of hearsay evidence alone would be met by the safeguards that it proposed, in particular that which was subsequently adopted as section 125 of the CJA 2003.

38. The principal safeguards designed to protect a defendant against unfair prejudice as a result of the admission of hearsay evidence, seen in the context of the more general safeguards that apply to every jury trial, can be summarised as follows:

i) The trial judge acts as gatekeeper and has a duty to prevent the jury from receiving evidence that will have such an adverse effect on the fairness of the proceedings that it should not be received.

ii) Hearsay evidence is only admissible in strictly defined circumstances. In essence the judge has to be satisfied beyond reasonable doubt that the prosecution is not able to adduce the evidence by calling the witness.

iii) Once the prosecution case is closed, the judge must withdraw the case from the jury if it is based wholly or partly on hearsay evidence and that evidence is so unconvincing that, considering its importance, the defendant's conviction would be unsafe.

iv) The judge has to direct the jury on the dangers of relying on hearsay evidence.

v) The jury has to be satisfied of the defendant's guilt beyond reasonable doubt.

vi) The defendant can apply for permission to appeal against his conviction, which will be granted where reasonable grounds for appeal are demonstrated. A failure to comply with the safeguards outlined above, and in particular the admission of hearsay evidence contrary to the rules on its admissibility, will constitute such grounds. Where the Court of Appeal finds that there has been such a failure, the appeal will be allowed unless the court is satisfied that, despite the shortcoming, the conviction is "safe".

39. As the Court of Appeal observed at paragraphs 77-78, the CJA 2003 has now been in force for a number of years and it is clear that the admissibility of hearsay evidence is being cautiously approached by the courts – see the passages quoted from *R v Y* [2008] 1 WLR 1683.

40. Sir Robin Auld in his Review of the Criminal Courts of England and Wales (2001) into the workings of the criminal courts expressed the view, supported by a body of academic opinion, that the recommendations of the Law Commission did not go far

enough. He recommended at paragraph 104 that hearsay should be generally admissible, subject to an obligation to adduce the "best evidence", rather than generally inadmissible subject to specified exceptions as proposed by the Law Commission. But in the event (as indicated in para 29 above), it was upon the Law Commission's recommendations that the 2003 Act was essentially based.

Hearsay exceptions in other Commonwealth Jurisdictions

41. Other established common law jurisdictions, namely Canada, Australia and New Zealand have, by both common law and statutory development, recognised hearsay evidence as potentially admissible, under defined conditions, in circumstances where it is not possible to call the witness to give evidence, even where the evidence is critical to the prosecution case. An analysis of the position in those jurisdictions, prepared by Lord Mance, is annexed to this judgment as Annexe 1. This demonstrates that, under the common law and statutory exceptions to the hearsay rule recognised in those jurisdictions there is no rigid rule excluding evidence if it is or would be either the "sole" or "decisive" evidence, however those words may be understood or applied. Instead, the common law and legislature in these countries have, on a principled basis, carefully developed and defined conditions under which hearsay evidence may be admitted, in the interests of justice and on a basis ensuring that defendants receive a fair trial. Under the common law system of jury trial, the conditions relating to the admissibility of evidence combine, to this end, with the trial judge's role as gatekeeper in applying them and his general residual discretion to exclude prejudicial or unfair evidence from going before the jury.

Hearsay in the United States

42. The position in the United States differs markedly from that in this jurisdiction and in the Commonwealth jurisdictions to which I have referred.

43. In the United States, the Sixth Amendment to the Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining

> witnesses in his favour, and to have the Assistance of Counsel for his defence."

44. The right under the Sixth Amendment "to be confronted with the witnesses against him" has recently been interpreted in an absolute sense by the majority of the Supreme Court in *Crawford v Washington* 124 S.Ct. 1354 (2004), reversing its previous decision in *Ohio v Roberts* 448 U.S. 56; 100 S.Ct 2531 (1980), and in *Melendez-Diaz v Massachusetts* 25 June 2009. The majority in the Supreme Court in reaching these decisions took an "originalist" approach to the Constitution, relying on its view of the common law position in the late 17th century.

45. The result of these United States decisions is to exclude any "testimonial" evidence whatever in respect of which there has been or can be no cross-examination. Testimonial evidence is not precisely defined in these authorities, but includes police interrogations or prior testimony at a preliminary hearing or former trial (*Crawford* p.1374) and, in the light of *Melendez-Diaz*, certificates of state laboratory analysts stating that material seized by police and alleged by the prosecution to be connected to a defendant was a prohibited drug. Business records or statements in furtherance of a conspiracy were, in contrast, identified in *Crawford* at p.1367 as "by their nature…not testimonial". *Crawford* also recognised one possible exception to the principle requiring confrontation in respect of testimonial evidence, that is dying declarations (footnote 6, p.1367).

46. Article 6(3)(d) has not been interpreted by the Strasbourg Court in the same way that the US Supreme Court has now interpreted the Sixth Amendment. The Strasbourg Court has accepted that there are circumstances that justify the admission of statements of witnesses who have not been subject to "confrontation" with the defendant. The possibility remains, however, that by propounding the "sole or decisive test" the Strasbourg Court has condemned as rendering a trial unfair the admission of hearsay evidence in circumstances where the legislature and courts of this jurisdiction and of other important Commonwealth jurisdictions (Canada, Australia and New Zealand) have determined that the evidence can fairly be received. This is a startling proposition and one that calls for careful analysis of the Strasbourg jurisprudence.

Special measures and anonymity

47. I referred earlier to the recognition at common law of the defendant's right to know the identity of the witnesses to be called by the prosecution. This, coupled with the right of a defendant to know the case to be advanced against him, ensured that he could make proper preparations to examine the witnesses called at his trial. The right to know the witnesses' identities was thus an important element in the right of confrontation.

48. Where a witness is not prepared through fear to be seen to give evidence against a defendant there are two ways in which his evidence may none the less be placed before the court. If he has previously made a witness statement that statement can be read as evidence. Alternatively he may be persuaded to give evidence anonymously if special measures are taken to ensure that he cannot be recognised by the defendant. Similar issues can arise in respect of each method of adducing evidence and the Strasbourg jurisprudence sometimes does not draw a distinction between the two. In *Al-Khawaja* 49 EHRR 1 the Court held that the sole or decisive rule applied equally in the case of each. Mr Perry QC for the Crown urged that we should not consider anonymous witnesses but should confine ourselves to the circumstances of these appeals which concern the reading of statements of absent witnesses. This was the course followed by the Court of Appeal, who suggested that the Strasbourg jurisdiction dealing with anonymous witnesses did not necessarily apply to absent witnesses.

49. There is a difference of principle between a witness who cannot be called to give evidence because, for instance, he is dead or untraceable, and a witness who is able and available to give evidence but not willing to do so. It might be argued that, where a witness is in a position to give evidence, fairness demands that his evidence should not be used if he is not prepared to face the defendant in court without anonymity. But, as I shall show, both the Strasbourg Court and the United Kingdom Parliament and, indeed, the Ministers of the Council of Europe have recognised that in some circumstances it is permissible to allow witnesses to give their evidence anonymously.

50. So far as a sole or decisive rule is concerned, I am not persuaded that there is a difference in principle between its existence in relation to absent witnesses and its existence in relation to anonymous witnesses. Each situation results in a potential disadvantage for the defendant. The extent of that disadvantage will depend on the facts of the particular case. I cannot see why a sole or decisive test should apply in the case of anonymous evidence but not in the case of a witness statement. The critical question is whether, in either case, the demands of a fair trial require that a sole or decisive test should apply regardless of the particular circumstances and, in particular, regardless of the cogency of the evidence. Accordingly, I propose to set out the approach of English law to anonymity.

51. Some witnesses in criminal proceedings are intimidated by giving evidence or by the prospect of so doing. This is especially true of children and those who are mentally or physically disabled, but it can also be the case of victims who fear being confronted by the defendant, particularly in cases of sexual offences. Section 16 of the Youth Justice and Criminal Evidence Act 1999 makes those who are under 17 or incapacitated eligible for “special measures” when giving evidence. Section 17 does the same in the case of any witness if the court is satisfied that the quality of his or her evidence is likely to be diminished by fear or distress when testifying. Special measures include giving evidence screened from the defendant or by video link.

52. Over the last 20 years judges purported to exercise a common law power to permit witnesses to give evidence anonymously, sometimes resorting to special measures in order to conceal their identities, where this was considered necessary in the interests of justice. In some cases permission was given because of the desirability of not disclosing the identity of undercover police agents; in others because of fear on the part of the witness of retaliation by or on behalf of defendants. In *R v Davis* [2008] UKHL 36; [2008] AC 1128 this practice was challenged before the House of Lords. The appellant had been convicted of murdering two men by shooting them at a party. He was identified as the murderer by three witnesses who had been permitted to give evidence anonymously, from behind screens, because they had refused, out of fear, to testify should their identities be disclosed. It was submitted on behalf of the appellant that this procedure was contrary both to the common law right of a defendant to be confronted by his accusers and to article 6(3)(d) of the Convention. Both limbs of this argument were accepted unanimously by the House.

53. Lord Bingham of Cornhill at paragraph 5 of his opinion set out the history of the "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". He observed at paragraph 20 that the statutory exceptions to calling a witness in the CJA 2003 did not permit the adducing of a statement by any witness whose name and identity was not disclosed to the defendant and that the safeguards provided by that Act would be denied to a defendant who did not know the identity of the witness. Their Lordships held that it was not open to a judge to depart from the common law rule by allowing a witness to remain anonymous. While there might well be a need for such a measure in order to combat the intimidation of witnesses, it was for Parliament not the courts to change the law.

54. In the course of his concurring judgment Lord Mance carried out an analysis of the relevant Strasbourg case law. At paragraph 25 Lord Bingham adopted this analysis and summarised its effect as follows:

> "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."

In fact, as I shall show, Lord Bingham slightly overstated Lord Mance's conclusion.

55. As a result of this decision Parliament amended the common law. The Criminal Evidence (Witness Anonymity) Act 2008 gave the court the power to make a witness anonymity order in the circumstances and subject to the conditions prescribed by the Act. Such an order enables a witness to give evidence subject to special measures designed to protect the identity of the witness being known. Section 4 sets out the conditions for making such an order:

> "(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.
>
> (2) The court may make such an order only if it is satisfied that Conditions A to C below are met.
>
> (3) Condition A is that the measures to be specified in the order are necessary–
>
> > (a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or
> >
> > (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).
>
> (4) Condition B is that, having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial.
>
> (5) Condition C is that it is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that–
>
> > (a) it is important that the witness should testify, and
> >
> > (b) the witness would not testify if the order were not made.
>
> (6) In determining whether the measures to be specified in the order are necessary for the purpose mentioned in subsection (3)(a), the court must have regard (in particular) to any reasonable fear on the part of the witness–
>
> > (a) that the witness or another person would suffer death or injury, or
> >
> > (b) that there would be serious damage to property,

if the witness were to be identified."

Section 5 sets out the matters to be taken into consideration when deciding whether the considerations in section 4 are satisfied:

> "(1) When deciding whether Conditions A to C in section 4 are met in the case of an application for a witness anonymity order, the court must have regard to–
>
> (a) the considerations mentioned in subsection (2) below, and
>
> (b) such other matters as the court considers relevant.
>
> (2) The considerations are–
>
> (a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
>
> (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;
>
> (c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;
>
> (d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;
>
> (e) whether there is any reason to believe that the witness–
>
> (i) has a tendency to be dishonest, or
>
> (ii) has any motive to be dishonest in the circumstances of the case, having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;
>
> (f) whether it would be reasonably practicable to protect the witness's identity by any means other

> than by making a witness anonymity order specifying the measures that are under consideration by the court."

56. Thus Parliament has decreed that the question of whether evidence is or is likely to be sole or decisive is relevant to the question of whether the court should permit it to be given anonymously but there is no mandatory rule prohibiting the admission of such evidence.

Criminal procedure in the civil law jurisdictions

57. In *R(D) v Camberwell Green Youth Court* [2005] UKHL 4; [2005] 1 WLR 393 at paragraphs 10 and 11 Lord Rodger stated:

> "…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...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."

58. We have not been referred to the *travaux preparatoires* to the Convention or to the reason why paragraph (3)(d) was included in article 6.

59. The continental systems to which Lord Rodger referred are best exemplified by the French Criminal Procedure, upon which many others were based. This, together with other continental systems has undergone marked changes over the last fifty years, and is still facing proposed radical change. The marked difference between that system and the English system in 1953 was the importance of the inquisitorial phase of the French process, which, in the case of a serious offence, was the second of the three stages of the procedure. The first stage was a police investigation, under the supervision of the public prosecutor (ministère public), that ascertained that a crime had been committed and identified a suspect. The second stage was a judicial inquiry aimed at ascertaining the facts and determining whether there was a case against the suspect fit for trial (the

"instruction"). This stage was inquisitorial, classically conducted by a "juge d'instruction", an examining judge. The third stage was the trial itself.

60. The "instruction" was conducted in private episodically, often over many months, during which time the suspect might be held in detention. It included repeated interrogations of the suspect, who seldom exercised his right to remain silent. It included examination of witnesses in the absence of the suspect and his lawyer, unless the examining judge chose to arrange a confrontation with the suspect. Interrogations or examinations were not recorded verbatim, but in the form of a summary of the evidence given, dictated by the examining judge and recorded by a greffier. In this way a dossier was built up. This dossier formed the basis of the conduct of the trial by the judge presiding. The reports of the Strasbourg cases show that evidence given during the instruction by witnesses whom the defendant had had no chance to question was frequently used at the trial. There was no bar to the reception of hearsay evidence nor rules of admissibility designed to prevent the tribunal at the trial from receiving evidence on the ground that its prejudicial effect outweighed its probative value.

61. Generally speaking the "instruction" was the most significant stage of the criminal process – all the more so because the "guilty plea" procedure was unknown. In this jurisdiction a defendant may decide to "plead guilty" at any stage between being charged and the trial. If he takes this course there will be no trial. Well over 80% of criminal prosecutions are resolved by a plea of guilty. If a trial takes place, this is because the defendant contests his guilt. Under the civil law system there is no such procedure. Guilt must always be proved at the trial. But if the defendant has confessed his guilt in one of the earlier stages of the procedure and does not retract that confession at his trial, the trial will be very much a formality.

62. In this jurisdiction there is no judicial investigation, in the course of which a confrontation can take place between witnesses and the suspect. The investigation into a crime is carried out by the police, who do not act as judicial officers, although they act under the supervision of the independent Crown Prosecution Service (para 16 above). If the police obtain sufficient evidence to justify a prosecution, the defendant must then be charged. Thereafter he is immune from further questioning unless and until he chooses to give evidence at his trial.

The Strasbourg jurisprudence prior to Al-Khawaja

63. The wording of article 6(3)(d) suggests that it required a procedure similar to that which followed from the application in this jurisdiction of the hearsay rule. It appears to require the witness to give his or her evidence live at the trial and thus to be subject to examination by or on behalf of the defendant. Some of the early jurisprudence supports

this approach. Thus the Court held that the paragraph (3)(d) rights applied at the trial and not when a witness was being questioned by the police – *X v Germany* (1979) 17 DR 231 or by the investigating judge – *Ferrari-Bravo v Italy* (1984) 37 DR 15.

64. But, just as in this jurisdiction it was found that, in some circumstances, justice required exceptions to the hearsay rule, the Strasbourg Court came to accept that some exceptions had to be made to the strict application of article 6(3)(d). The Strasbourg jurisprudence deals with the two situations that raise similar issues of principle: the admission of evidence of a witness who is anonymous and the admission of evidence in the form of a statement made by a witness who is not called to testify.

65. The Strasbourg jurisprudence in relation to article 6, and article 6(3)(d) in particular, has received detailed consideration by courts in this country on a number of occasions prior to this case. The conclusions reached, prior to the decision of the Strasbourg Court in *Al-Khawaja*, were summarised by Lord Bingham in *Grant v The Queen* [2006] UKPC 2; [2007] 1 AC 1 at paragraph 17 (Strasbourg references omitted):

> "The Strasbourg court has time and again insisted that the admissibility of evidence is governed by national law and that its sole concern is to assess the overall fairness of the criminal proceedings in question…
>
> . . .
>
> The Strasbourg court has been astute to avoid treating the specific rights set out in article 6 as laying down rules from which no derogation or deviation is possible in any circumstances. What matters is the fairness of the proceedings as a whole.
>
> . . .
>
> the Strasbourg court has recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, and has described the search for that balance as inherent in the whole Convention…Thus the rights of the individual must be safeguarded, but the interests of the community and the victims of crime must also be respected. An example, not based on the present facts, illustrates the point. In Jamaica, as in England and Wales, as already noted, the statement of a witness may be adduced in evidence if he is shown to have absented himself through fear of the consequences to him if he gives evidence. In the case of a prosecution witness, such fear is likely to have been induced by or on

> behalf of a defendant wishing to prevent adverse evidence being given. As observed by Potter LJ in *R v M (KJ)* [2003] 2 Cr App R 322, para 59, echoed by Waller LJ in *R v Sellick* [2005] I WLR 3257, paras 36, 52-53, it would be intolerable if a defendant shown to have acted in such a way could rely on his human rights under article 6 (or section 20) to prevent the admission of hearsay evidence. Where a witness is unavailable to give evidence in person because he is dead, or too ill to attend, or abroad, or cannot be traced, the argument for admitting hearsay evidence is less irresistible, but there may still be a compelling argument for admitting it, provided always that its admission does not place the defendant at an unfair disadvantage.
>
> While, therefore, the Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross-examination by the defence, the focus of its inquiry in any given case is not on whether there has been a deviation from the strict letter of article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole. This calls for consideration of the extent to which the legitimate interests of the defendant have been safeguarded."

66. This is, I believe, a fair and accurate summary of a difficult area of Strasbourg jurisprudence. Article 6(3)(d) is concerned with the fairness of the trial procedure. It recognises that a fair procedure should entitle the defendant to have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf. What the article does not deal with is the procedure that is appropriate where it is simply not possible to comply with article 6(3)(d); where, for instance, after making a statement, the witness for the prosecution or defence has died. Fairness does not require that in such circumstances the evidence of the witness should not be admitted at the trial. On the contrary it may well require that it should be admitted. The Strasbourg Court has recognised this. As the Court of Appeal in the present case pointed out in paragraph 37 of its judgment examples of the admission of statements in such circumstances include death: *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288; illness: *Trivedi v United Kingdom* (1997) 89-A DR 136 and impossibility of tracing the witness: *Artner v Austria* (Application No 13161/87), 25 June 1992.

67. Thus where a statement has been read of an absent witness, or evidence has been given anonymously, the Strasbourg Court first considers whether there was justification for this course. When considering justification the Strasbourg Court properly has regard to the human rights of witnesses and victims. In *Doorson v The Netherlands* (1996) 22 EHRR 330 the Court observed:

> "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."

68. One situation where Strasbourg has recognised that there is justification for not calling a witness to give evidence at the trial, or for permitting the witness to give that evidence anonymously, is where the witness is so frightened of the personal consequences if he gives evidence under his own name that he is not prepared to do so. If the defendant is responsible for the fear, then fairness demands that he should not profit from its consequences. Even if he is not, the reality may be that the prosecution are simply not in a position to prevail on the witness to give evidence. In such circumstances, having due regard for the human rights of the witness or the victim, as well as those of the defendant, fairness may well justify reading the statement of the witness or permitting him to testify anonymously. Claims of justification on such grounds have to be rigorously examined - see *Doorson v The Netherlands* (1996) 22 EHRR 330 at paragraph 71, *Kok v The Netherlands* (Application No 43149/98), Reports of Judgments and Decisions 2000-VI, p 597; *Visser v The Netherlands* (Application No 26668/95), 14 February 2002 at paragraph 47; *Krasniki v Czech Republic* (Application No 51277/99), 28 February 2006 at paragraphs 80-81; *Lucà v Italy* (2001) 36 EHRR 807 at paragraph 40:

> "As the Court has stated on a number of occasions, 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)."

69. Where the court has found justification for the admission of a statement from a witness not called, or for a witness giving evidence anonymously, the Court has been concerned with whether the process as a whole has been such as to involve the danger of a miscarriage of justice. The exercise has been similar to that conducted by the English Court of Appeal when considering whether, notwithstanding the breach of a rule relating to admissibility, the conviction is "safe". There is, of course, an overlap between

considering whether procedure has been fair and whether a verdict is safe, and it is sometimes difficult to distinguish between the two questions.

70. *Doorson v The Netherlands* is a particularly informative example of the approach of the Strasbourg Court to a situation where there was justification both for admitting the statement of a witness who was not called to give evidence and for hearing the evidence of two anonymous witnesses whose evidence was not given in the presence of the defendant. The applicant was convicted of drug trafficking. The justification for admitting the statement of the witness who was not called was that he had absconded and it was thus impossible to call him to give evidence. The justification for permitting the two witnesses to give evidence anonymously and without the defendant being present was that it was reasonable for them to fear reprisals from the applicant if he discovered that they had given evidence against him, albeit that there was no evidence that they had ever been threatened by the applicant.

71. Both the opinion of the Commission and the judgment of the Court suggest that the primary concern of each when considering whether the admission of the evidence had rendered the trial unfair was whether the evidence was reliable. So far as the witness who had absconded was concerned, the Commission held that it could not be regarded as unfair if the courts took into account the statement that he had made to the police (paragraph 78). The Court held that it had been permissible for the court to have regard to the statement "especially since it could consider that statement to be corroborated by other evidence before it" (paragraph 80).

72. So far as the anonymous witnesses were concerned, the Court of Appeal had ordered them to be examined by an investigating judge in the presence of the defendant's counsel, though not of the defendant. She knew the identity of the witnesses. She reported that she "had the impression that both witnesses knew whom they were talking about" and that "her impression had been that the witnesses themselves believed their statements to be true" (paragraph 32). The Court concluded that:

> "in the circumstances the 'counterbalancing' procedure followed by the judicial authorities in obtaining the evidence of witnesses Y15 and Y16 must be considered sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements, which it did in open court by, amongst other things, drawing attention to the fact that both were drug addicts."

73. Although, as I have shown, the Strasbourg Court has accepted that in exceptional cases failure to comply with the strict requirements of article 6(3)(d) will not invalidate the fairness of the trial, the Court has not acknowledged this in terms. The Court might have said, in terms, that paragraph (3)(d) has no application where it is impossible to call a witness at the trial, but it did not. The Court might have said, in terms, that in exceptional circumstances a failure to comply with paragraph (3)(d) will not render the trial unfair, but it did not. Rather the Court has used language that has tended to obscure the fact that it is, in reality and in special circumstances, countenancing a failure to comply with the requirements of paragraph (3)(d). I shall take *Kostovski v The Netherlands* (1989) 12 EHRR 434 as an example of the language used. The phraseology is almost standard form in cases dealing with article 6(3)(d).

74. The recital of the relevant legal principles begins with this statement:

> "It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them.
>
> In the light of these principles the Court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair.
>
> This being the basic issue, and also because the guarantees in article 6(3) are specific aspects of the right to a fair trial set forth in paragraph (1), the Court will consider the applicant's complaints from the angle of paragraphs (3)(d) and (1) taken together."

This passage indicates that the fairness of a trial has to be assessed on a case by case basis, viewing each trial as a whole, and that an inability on the part of a defendant to cross-examine the maker of a statement that is admitted in evidence will not necessarily render the trial unfair.

75. The Court in *Kostovski* went on to say this:

> "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to

> adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."

There are two points to make in respect of this passage. The first is that the phrases "in principle" and "as a rule" reflect the fact that the Strasbourg Court has recognised that the requirements of article 6(3)(d) are not absolute or inflexible. The second point is that the proposition that "an accused should be given an adequate and proper opportunity to challenge and question a witness against him, *either at the time the witness was making his statement or at some later stage of the proceedings"* (emphasis mine) reflects Strasbourg jurisprudence which appears to dilute the protection that article 6(3)(d) would otherwise supply. One of the objects of the right of a defendant to cross-examine witnesses is to give the trial court the chance of "observing their demeanour under questioning and thus forming its own impression of their reliability" – see *Kostovski* at paragraph 43. The aim is "adversarial argument" at a "public hearing" – see *Kostovski* at paragraph 41. These objects will not be achieved by granting the defendant or his lawyers an opportunity to confront or question witnesses in the course of the inquisitorial investigation by the investigating judge. The words that I have emphasised, repeated again and again in the Strasbourg jurisprudence, appear to suggest that a right to challenge a witness at the investigatory stage of the criminal process will be enough to satisfy article 6(3)(d). This exemplifies the danger that repeated repetition of a principle may lead to its being applied automatically without consideration of whether, having regard to the particular facts of the case, its application is appropriate. The true position is, I suggest, that where possible the defendant should be entitled to examine witnesses at the trial but that, where this proves impossible, the fact that the defendant had a right to challenge the witness at the investigatory stage is a relevant factor when considering whether it is fair to rely on the witness' deposition as evidence at the trial – see, for instance, *Lucà v Italy* (2001) 36 EHRR 807.

The sole or decisive rule

76. The sole or decisive rule entered the Strasbourg jurisprudence in *Doorson v The Netherlands* where, having found justification for admitting the statement of an absent witness and for the anonymity of two witnesses, the Court added:

> "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."

77. The seeds of the sole or decisive rule would seem to be found in a series of earlier cases, details of which are set out in Annexe 2 to this judgment. In most of these cases there had been a failure to comply with the requirements of article 6(3)(d) for which there was no justification. The Court none the less considered it relevant to consider the impact of the evidence in question on the applicant's conviction when deciding whether this had rendered the trial unfair in violation of article 6(1). The inference was that if the evidence had not had a significant effect on the outcome of the trial, there would be no violation of article 6(1). The sole or decisive test propounded in *Doorson* went a significant step further. It stated that, even where there was justification for not calling a witness, basing a conviction solely or decisively on the evidence of that witness would be unfair.

78. In 1997 the Committee of Ministers of the Council of Europe published Recommendation No R (97) 13 concerning "Intimidation of Witnesses and the Rights of the Defence". This included "measures to be taken in relation to organised crime". The measures dealt with different methods of protecting witnesses from the risk of reprisals, or accommodating their fear of such reprisals. These included admitting evidence of pre-trial statements made before a judicial authority and preserving the anonymity of witnesses. In relation to anonymity, the Ministers recommended "When anonymity has been granted the conviction shall not be based solely or to a decisive extent on the evidence of such persons". The recommendation would seem to have been derived from the Strasbourg jurisprudence, for the preamble to the Recommendation recites:

> ""Bearing in mind the provisions of the European Convention on Human Rights and the case-law of its organs, 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;"

79. In his review of the Strasbourg jurisprudence in *Grant v The Queen* Lord Bingham did not address the question of whether the admission of hearsay evidence was subject to the "sole or decisive" test. That question was considered by the Court of Appeal in *R v Sellick* [2005] EWCA Crim 651; [2005] 1 WLR 3257. In that case the trial judge had permitted the statements of witnesses to be read pursuant to sections 23 and 26 of the 1988 Act on the ground that they had not given evidence through fear. Waller LJ reviewed the Strasbourg authorities and summarised the position as follows:

"50. What appears from the above authorities are the following propositions. (i) The admissibility of evidence is primarily for the national law. (ii) Evidence must normally be produced at a public hearing and as a general rule article 6(1) and (3)(d) of the Convention require a defendant to be given a proper and adequate opportunity to challenge and question witnesses. (iii) It is not necessarily incompatible with article 6(1) and (3)(d) of the Convention for depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held. The reasons for the court holding it necessary that statements should be read and the procedures to counterbalance any handicap to the defence will all be relevant to the issue, whether, where statements have been read, the trial was fair. (iv) The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to reliance on it, will also be relevant to the question whether the trial was fair.

51. The question is whether there is a fifth proposition to the effect that where the circumstances would otherwise justify the reading of the statement where the defendant has had no opportunity to question the witness at any stage of the trial process, the statement must not be allowed to be read if it is the sole or decisive evidence against the defendant. Certainly at first sight para 40 of *Lucà v Italy* 36 EHRR 807 seems to suggest that in whatever circumstances and whatever counterbalancing factors are present if statements are read then there will be a breach of article 6 of the Convention, if the statements are the sole or decisive evidence. Furthermore there is some support for that position in the previous authorities. But neither *Lucà v Italy* nor any of the other authorities were concerned with a case where a witness, whose identity was well known to a defendant, was being kept away by fear, although we must accept that the reference to Mafia-type organisations and the trials thereof in para 40 of *Lucà v Italy* shows that the court had extreme circumstances in mind.

52. The question we have posed to ourselves is as follows. 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."

In *R v Davis* Lord Mance analysed the Strasbourg jurisprudence in relation to anonymous witnesses and summarised his conclusions as follows:

> "89. In his submissions for the Crown Mr Perry suggested that any requirement that anonymous evidence should not be the sole or decisive basis for conviction derived from the authorities on pretrial 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 paras 84-86 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."

80. The Court in *Doorson v The Netherlands* gave no explanation for the sole or decisive rule. It was not a rule that was relevant on the facts of that case, so an English jurist might suggest that it was mere obiter dicta which need not be afforded much weight. But the rule was propounded repeatedly in subsequent cases, and it is necessary to consider these in order to attempt to deduce the principle underlying the rule. I have set out a brief analysis of a number of the decisions in an attempt to identify the governing principle. This forms Annexe 3 to this judgment.

81. It is clear from these cases that a failure to comply with article 6(3)(d), even if there is no justification for this, does not automatically result in a violation of article 6(1). It is necessary to consider whether the failure has affected the result. If it has not, no question of a violation of article 6(1) arises – see *X v United Kingdom* (1992) 15 EHRR CD 113; *Craxi v Italy* (Application No 34896197), 5 December 2002. Where there has been a failure to comply with article 6(3)(d) for which there is no justification, the Court has found a violation of article 6(1) where the evidence may have contributed to the applicant's conviction - *Lüdi v Switzerland* (1992) 15 EHRR 173; *Taxquet v Belgium* (Application No 926105), 13 January 2009.

82. In the majority of cases there has been a failure to comply with article 6(3)(d) which has not been justified and the evidence in question has been the sole or decisive basis of the applicant's conviction. A violation of article 6(1) has naturally been found in such cases.

83. Where there is justification for a failure to comply with the requirements of article 6(3)(d) because, for instance, it is impossible in fact or law to procure the presence of the witness for cross-examination, the Court has been concerned with the reliability of the

evidence in question. In two cases which preceded *Doorson*, no violation of article 6(1) was found where the evidence in question was the principal evidence, but where it was supported by other evidence: *Asch v Austria* (Application No 12398/86), 29 April 1991 and *Artner v Austria* (Application No 13161/87), 25 June 1992.

84. *Ferrantelli and Santangelo v Italy* 23 EHRR 288 was a case decided soon after *Doorson*. The sole or decisive test was not mentioned. The applicants were convicted of being party to the murder of two police officers committed by V. The principal evidence against them consisted of statements made by V. There was no confrontation between V and the applicants. V committed suicide before the trial. In these circumstances there was justification for reading his statements. The Court found that the applicants had had a fair trial and that there had been no violation of articles 6(1) and article 6(3)(d). In so finding it had regard to the fact that the trial court had conducted detailed analysis of the statements and found them to be corroborated.

85. In *Doorson* itself, which was primarily an anonymity case, the Court found that it had been acceptable to have regard to a statement of a witness whose attendance could not be procured "especially since it could consider that statement to be corroborated by other evidence before it".

86. No explanation was given in *Doorson* in respect of the principle underlying the sole or decisive test first propounded by the Court in that case, and, so far as I am aware, the Strasbourg Court has not subsequently explained why a conviction based in part on the evidence of a witness who was not called, or who was anonymous, need not offend article 6(1) and (3)(d), while, on the contrary, if the evidence is sole or decisive the article will be violated. I have concluded, however, that the Strasbourg Court has drawn the distinction on the premise that a conviction based solely or decisively upon the evidence of a witness whose identity has not been disclosed, or who has not been subjected to cross-examination, or both, will not be safe. I have reached this conclusion for a number of reasons. First because there is nothing intrinsically objectionable or unfair in having regard to the statement of a witness where it is simply not possible to call that witness to give the evidence in question. Secondly because of the general emphasis that the Strasbourg Court understandably places on the reliability of evidence. Thirdly because the approach evidenced by the passage quoted from *Kok* in Annexe 3 seems to treat reliability as being the relevant factor and finally because I have not been able to identify any convincing alternative rationale for the sole or decisive test.

Practicality

87. One of the reasons why the Court of Appeal was not prepared to accept that the sole or decisive rule applied to English criminal law was the fact that the application of

that rule would give rise to severe practical difficulties under our system. Two questions arise in relation to practicability. (1) How easy is it for the trial court itself to apply the sole or decisive test? (2) How easy is it for an appeal court, or for the Strasbourg Court, to determine whether the test has been properly applied? The Strasbourg Court has repeatedly emphasised that it is not its task to rule on admissibility but to consider whether the trial as a whole has been fair. When considering articles 6(1) and 6(3)(d) Strasbourg is concerned not with whether a statement ought to have been admitted in evidence by the trial court but with the use the trial court has made of the evidence. The sole or decisive test permits a court to take the evidence into account but not to base a conviction solely or decisively upon it.

88. In a dissenting opinion in *Van Mechelen v The Netherlands* (1997) 25 EHRR 647 Judge van Dijk expressed the view that the sole or decisive test "is difficult to apply, because if the testimony of anonymous witnesses is used by the court as part of the evidence, that will always be because the court considers it a 'decisive' part of that evidence." This comment raises the question of what is meant by "decisive". Under English procedure no evidence should be admitted unless it is potentially probative. In theory any item of probative evidence may make all the difference between conviction and acquittal. It may be the vital piece of evidence which tilts the scales enough to satisfy the tribunal beyond reasonable doubt that the defendant is guilty. Is such a piece of evidence to be treated as decisive? In *Al-Khawaja* at paragraph 39 the Court relied, as indicating that a statement was decisive, on the statement of the Court of Appeal in *Tahery* that it was "both important and probative of a major issue in the case. Had it not been admitted the prospect of a conviction would have receded and that of an acquittal advanced".

89. Whatever be the precise definition of "decisive", the duty not to treat a particular piece of evidence as "decisive" is hard enough for a professional judge to discharge. In theory he can direct himself that he must not convict if the relevant statement is decisive, and state in a reasoned judgment that he has complied with that direction. In practice such a course will often not be easy. As for the Court of Appeal or the Strasbourg Court, it will often be impossible to decide whether a particular statement was the sole or decisive basis of a conviction.

90. In the case of a jury trial, a direction to the jury that they can have regard to a witness statement as supporting evidence but not as decisive evidence would involve them in mental gymnastics that few would be equipped to perform. If the sole or decisive test is to be applied in the context of a jury trial, the only practical way to apply it will be a rule of admissibility. The judge will have to rule inadmissible any witness statement capable of proving "decisive". This will be no easy task – see the judgment of the Court of Appeal at paragraphs 68 to 70. If "decisive" means capable of making the difference between a finding of guilt and innocence, then all hearsay evidence will have to be excluded. In Trechsel's lengthy analysis of this area of the law in *Human Rights in Criminal Proceedings* the author advances precisely this proposition at p 298.

Discussion

91. The sole or decisive test produces a paradox. It permits the court to have regard to evidence if the support that it gives to the prosecution case is peripheral, but not where it is decisive. The more cogent the evidence the less it can be relied upon. There will be many cases where the statement of a witness who cannot be called to testify will not be safe or satisfactory as the basis for a conviction. There will, however, be some cases where the evidence in question is demonstrably reliable. The Court of Appeal has given a number of examples. I will just give one, which is a variant of one of theirs. A visitor to London witnesses a hit and run road accident in which a cyclist is killed. He memorises the number of the car, and makes a statement to the police in which he includes not merely the number, but the make and colour of the car and the fact that the driver was a man with a beard. He then returns to his own country, where he is himself killed in a road accident. The police find that the car with the registration number that he provided is the make and colour that he reported and that it is owned by a man with a beard. The owner declines to answer questions as to his whereabouts at the time of the accident. It seems hard to justify a rule that would preclude the conviction of the owner of the car on the basis of the statement of the deceased witness, yet that is the effect of the sole or decisive test.

92. As I have suggested earlier, the justification for the sole or decisive test would appear to be that the risk of an unsafe conviction based solely or decisively on anonymous or hearsay evidence is so great that such a conviction can never be permitted. Parliament has concluded that there are alternative ways of protecting against that risk that are less draconian, as set out in the 1988 and 2003 Acts (and now, with regard to anonymous witnesses, the 2008 Act). When the Strasbourg decisions are analysed it is apparent that these alternative safeguards would have precluded convictions in most of the cases where a violation of article 6(1) and (3)(d) was found. In particular the legislation does not permit the admission of the statement of a witness who is neither present nor identified. Where the witness is unavailable but identified, or present but anonymous, the respective Acts provide the safeguards to which I have referred earlier against the risk that the use of the witness' evidence will render the verdict unsafe and the trial unfair.

93. Lord Judge has subjected many of the Strasbourg decisions to which I have referred, together with a number of others, to a detailed analysis. He has, for the most part chosen cases in which the Strasbourg Court held that article 6(1) taken together with article 6(3)(d) had been violated. Under our domestic principles of admissibility in almost all of these cases the relevant evidence would have been ruled inadmissible and the defendant would not have been convicted. The cases suggest that in general our rules of admissibility provide the defendant with at least equal protection to that provided under the continental system. Lord Judge's analysis is annexed to this judgment as Annexe 4.

94. Before *Al-Khawaja*, while the Strasbourg Court had repeatedly recited the sole or decisive test, there had, as the Court of Appeal observed, been no case where that test had been applied so as to produce a finding of a violation of article 6(1) and (3)(d) in a case where there had been justification for not calling a witness and where the evidence was demonstrably reliable. Nor had the sole or decisive rule ever been applied or cited in an application in relation to the criminal process in this jurisdiction. Thus no consideration had been given as to whether it was necessary or appropriate to apply that rule having regard to the safeguards inherent in our system. It is time to turn to consider *Al-Khawaja*.

Al-Khawaja

95. In *Al-Khawaja* 49 EHRR 1 the Court heard two applications together. Mr Al-Khawaja had been convicted on two counts of indecent assault on female patients. The first had made a statement to the police providing details of the assault, but subsequently committed suicide for reasons unconnected to the assault. Her statement was admitted under the 1988 Act. Mr Tahery was convicted of wounding with intent. An Iranian had been stabbed in the back in a brawl. Another Iranian made a statement to the police saying that he had seen Mr Tahery inflict the wound. He subsequently refused to give evidence because of fear. The judge gave permission for his statement to be read pursuant to section 116(2)(e) of the 2003 Act. Appeals by each applicant were dismissed by the Court of Appeal. Each applicant complained to the Strasbourg Court that his rights under article 6(3)(d) had been violated.

96. In the section of its judgment dealing with the merits the Court began by setting out "*general principles applicable to both cases*". This section began:

> "Article 6(3)(d) is an aspect of the right to fair trial guaranteed by article 6(1), which, in principle, requires that all evidence must be produced in the presence of the accused in a public hearing with a view to adversarial argument (*Krasniki v Czech Republic* (Application No 51277/99), 28 February 2006, para 75). As with the other elements of article 6(3), it is one of the minimum rights which must be accorded to anyone who is charged with a criminal offence. As minimum rights, the provisions of article 6(3) constitute express guarantees and cannot be read, as it was by the Court of Appeal in *Sellick* (see para [25] above), as illustrations of matters to be taken into account when considering whether a fair trial has been held (see *Barberà v Spain* (1987) 9 EHRR CD101, paras 67 and 68; *Kostovski v The Netherlands*, (1989) 12 EHRR 434, para 39)."

97. I find it impossible to reconcile this paragraph with statements of principle that the Strasbourg Court has regularly made in respect of the interrelationship between articles 6(1) and 6(3)(d), as quoted from *Kostovski* at paragraph 75 (above). These statements indicate that the fairness of a trial has to be assessed on a case by case basis, viewing each trial as a whole, and that an inability on the part of a defendant to examine the maker of a statement that is admitted in evidence will not necessarily render the trial unfair. The statement of principle in the opening passage in *Kostovski* is notably absent from the judgment in *Al-Khawaja*. That which replaces it is at odds with the approach in the individual Strasbourg cases to which I have referred.

98. The Court went on to add:

> "Equally, even where those minimum rights have been respected, the general right to a fair trial guaranteed by article 6(1) requires that the Court ascertain whether the proceedings as a whole were fair."

This proposition is unexceptionable. What is puzzling is that the Court should cite *Unterpertinger v Austria* in support of it, for that was a case where the Court found that both articles 6(1) and 6(3)(d) had not been satisfied.

99. I now come to the crucial passages in *Al-Khawajia*. At paragraph 36 the Court said:

> "Whatever the reason for the defendant's inability to examine a witness, whether absence, anonymity or both, the starting point for the Court's assessment of whether there is a breach of article 6(1) and (3)(d) is set out in *Lucà* … at para 40:
>
> > '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 [references omitted].'"

100. The first point to be made about this citation from *Lucà* is that neither of the propositions that it contains is axiomatic. For reasons that I have already given, an opportunity to challenge a deposition when made, whether the opportunity is taken or not, will not necessarily render it fair at the trial simply to read the deposition if the maker can be called to give evidence.

101. The second proposition incorporates the sole or decisive test. That test is not the corollary of the first proposition. It is not to be found in article 6(3)(d). It has, as I have shown, been developed in the jurisprudence of the Strasbourg Court.

102. In both *Al-Khawaja* and *Tahery* the statements admitted in evidence were central to the prosecution case but were, in each case, supported by other evidence. The Court of Appeal had held, in each case, that there was no reason to doubt the safety of the conviction. In *Al-Khawaja*, the Court of Appeal, citing *Sellick*, had held that the Strasbourg case law did not require the conclusion that, in the circumstances of that case, the trial would be unfair. The Strasbourg Court's response appears in paragraph 37 of its judgment:

> "The Court notes that in the present cases the Government relying on the Court of Appeal's judgment in *Sellick* (see paragraph 25 above), argue that this Court's statement in *Lucà* and in other similar cases is not to be read as laying down an absolute rule, prohibiting the use of statements if they are the sole or decisive evidence, whatever counterbalancing factors might be present. However, the Court observes that the Court of Appeal in *Sellick* was concerned with identified witnesses and the trial judge allowed their statements to be read to the jury because he was satisfied that they were being kept from giving evidence through fear induced by the defendants. That is not the case in either of the present applications and, in the absence of such special circumstances, the Court doubts whether any counterbalancing factors would be sufficient to justify the introduction in evidence of an untested statement which was the sole or decisive basis for the conviction of an applicant. While it is true that the Court has often examined whether the procedures followed in the domestic courts were such as to counterbalance the difficulties caused to the defence, this has been principally in cases of anonymous witnesses whose evidence has not been regarded as decisive

> and who have been subjected to an examination in some form or other."

103. There are two points to be made about this passage. The first is that the Court appears to have accepted that the sole or decisive rule does not apply so as to preclude the reliance on the statement of a witness who refuses to testify because of fear induced by the defendant. The second is that the Court did not completely close the door to the possibility of "counterbalancing factors" being sufficient to justify the introduction of a statement as sole or decisive evidence in other circumstances. The Court made it quite plain, however, that compliance with the statutory regime under which the statements in the two appeals had been admitted carried "limited weight" – paragraph 40.

104. The Court must surely have been correct to recognise that the sole or decisive rule does not apply where a defendant has induced such fear in a witness that the witness refuses to testify. A defendant can never be heard to complain of the absence of a witness if he has been responsible for that absence. It is, however, notoriously difficult for a court to be certain that a defendant has threatened a witness, for if the threat is effective the witness is likely to be too frightened to testify to it. The Strasbourg Court has recognised that anonymity can be justified where a witness is too frightened to be identified, even where the defendant has not himself induced the fear – *Doorson*, *Kok* and *Visser*. There are strong reasons of policy why the evidence of such a witness should be received, subject to adequate safeguards, and this is recognised by section 116 of the 2003 Act.

105. The sole or decisive rule was first propounded in *Doorson* as an *obiter* observation, without explanation or qualification. It has since frequently been repeated, usually in circumstances where there has been justification for finding breaches of article 6(1) and (3)(d) without reliance on the test. If applied rigorously it will in some cases result in the acquittal, or failure to prosecute, defendants where there is cogent evidence of their guilt. This will be to the detriment of their victims and will result in defendants being left free to add to the number of those victims.

106. The Court of Appeal in this case, comprising five senior judges with great experience of the criminal jurisdiction, referred to the manner in which the 2003 Act is working in practice and concluded that provided its provisions are observed there will be no breach of article 6 and, in particular, article 6(3)(d), if a conviction is based solely or decisively on hearsay evidence – paragraph 81. The court thus differed from the doubt expressed in *Al-Khawaja* as to whether there could be any counterbalancing factors sufficient to justify the introduction of an untested statement which was the sole or decisive basis for a conviction.

107. I concur in these conclusions reached by the Court of Appeal and the reasons for those conclusions so clearly and compellingly expressed. The jurisprudence of the Strasbourg Court in relation to article 6(3)(d) has developed largely in cases relating to civil law rather than common law jurisdictions and this is particularly true of the sole or decisive rule. In the course of the hearing in *Al-Khawaja*, Sir Nicolas Bratza observed that both parties had accepted the sole or decisive test which appears in *Lucà* and other cases as an accurate summary of the Court's case law. He asked whether there was any authority of the Court which gave any scope for counterbalancing factors in a sole or decisive case. Mr Perry for the Government conceded that he was not aware of any direct authority on the point. The Court then applied the sole or decisive rule in reliance on the pre-existing case law. But as I have shown that case law appears to have developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure. Nor, I suspect, can the Strasbourg Court have given detailed consideration to the English law of admissibility of evidence, and the changes made to that law, after consideration by the Law Commission, intended to ensure that English law complies with the requirements of article 6(1) and (3)(d).

108. In these circumstances I have decided that it would not be right for this court to hold that the sole or decisive test should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. I believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason. In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case.

The individual appeals

109. Although the principal ground of appeal was that the sole or decisive rule had not been applied, counsel for the appellants in each appeal also argued that, quite apart from this rule, the relevant statements should not have been admitted. In the case of Horncastle and Blackmore the argument was that the deceased victim's statement was inherently unreliable. In the case of Marquis and Graham it was argued that the fear that had led to Miss Miles running away because she was too frightened to give evidence had been induced, not by the defendants, but by alarmist warnings given by the police and that, in these circumstances, it was unjust to put her statement in evidence.

110. These points received careful consideration by the Court of Appeal. I have found no basis for differing from the court's conclusion that they were without merit. Accordingly I propose simply to rely upon the reasoning of the Court of Appeal in dismissing these grounds of appeal.

111. For the reasons that I have given I would dismiss these appeals.

ANNEXE 1

(Prepared by Lord Mance – see paragraph 41).

1. In Canada, the Supreme Court addressed the question of the admission of hearsay evidence on three occasions, in *R v Khan* [1990] 2 SCR 531; *R v Smith* [1992] 2 SCR 915 and *R v Rockey* [1996] 3 SCR 829. It noted that the "purpose and reason of the Hearsay rule is the key to the exceptions to it", drawing in this connection on the well-known American text, *Wigmore on Evidence* (2nd ed. 1923). Wigmore went on to point out that the theory of the hearsay rule was that "the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination", but that, in circumstances in which a statement is free from this risk or in which cross-examination is impossible, it may be possible under certain conditions to contemplate its use without cross-examination.

2. The Supreme Court of Canada in *R v Smith*, at p 930, referred to the approach along these lines first adopted in *R v Khan* "as the triumph of a principled analysis over a set of ossified judicially created categories". It held that, in addition to the basic requirement of relevance, hearsay evidence might be admitted if there was sufficient necessity and its reliability could be sufficiently verified by the judge before it was put before the jury. In *R v Khan* evidence was thus admitted of an infant complainant's description to her mother shortly after the event of a sexual assault upon her, in circumstances where the infant was not permitted to testify at trial.

3. In *R v Smith* these tests were satisfied in relation to the contents of two of the critical three telephone calls made by the deceased to her mother shortly before death. However, in relation to the third call, although there was no problem about satisfying the test of necessity in view of her death, a careful review by the Court of the circumstances surrounding the call gave rise to apprehensions about its reliability, and a possibility that what had been said might have been mistaken or intended to deceive the mother. The contents of this call could not therefore safely be admitted in the absence of cross-examination. The conviction was set aside and a fresh trial ordered. *R v Rockey* was another case, like *R v Khan*, where the accused was charged with sexual assault on an infant (aged two and a half), who had made a number of statements about the incident. The Court was, after examination of the circumstances, satisfied that the requirements of both necessity and reliability were met. It found, with regard to necessity, that the infant though by now aged five, could not have given evidence in any meaningful sense, and would anyway have been traumatised by doing so. Reliability was not an issue on the appeal. If (which the Court did not decide) there was any error in the judge's directions to the jury, it was immaterial. It is right to add that, in this case (in contrast to *R v Khan* and *R v Smith*), there was also strong surrounding evidence inculpating the accused.

4. In Australia in the case of *Bannon v The Queen* (1995) 185 CLR 1, the High Court of Australia noted the Canadian decisions. Brennan CJ at p 12 expressed the view (obiter) that the approach they took should not be adopted in Australia. The other judges, Deane J at pp 12-13, Dawson, Toohey and Gummow JJ at pp 24-25 and 28 and McHugh J at pp 40-41 said that it was unnecessary to decide whether it should be adopted, although McHugh J also went further and said that "Adoption of the Canadian principle would undoubtedly have beneficial effects on the law of evidence". The case was actually decided on the basis that the evidence in question could not on any view be regarded as reliable and was rightly excluded from being put before the jury.

5. As McHugh J also noted, the federal Australian Parliament had enacted the Evidence Act 1995, and New South Wales had adopted comparable legislation. The federal Evidence Act 1995 contains a careful set of provisions regulating the admission of hearsay evidence. The starting point under s.59(1) is that hearsay evidence is generally excluded:

> "59(1). Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation.
>
> (2) Such a fact is in this Part referred to as an asserted fact."

There follow a number of specific exceptions, including:

> "*65 Exception: criminal proceedings if maker not available*
>
> (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
>
> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:
>
> > (a) was made under a duty to make that representation or to make representations of that kind; or
> >
> > (b) was made when or shortly after the asserted fact occurred and in circumstances that made it unlikely that the representation is a fabrication; or

(c) was made in circumstances that make it highly probably that the representation is reliable; or

(d) was:

(i) against the interests of the person who made it at the time it was made; and

(ii) made in circumstances that make it likely that the representation is reliable. …

66 Exception: criminal proceedings if maker available

(1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.

(2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:

(a) that person; or

(b) a person who saw, heard or otherwise perceived

the representation being made;

if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation."

The scheme of the Australian statute is both nuanced and circumscribed, with a view to ensuring the overall fairness of the proceedings.

6. The admissibility of hearsay evidence has also been addressed in New Zealand. In 1980 the legislature enacted the Evidence Amendment Act (No.2) 1980. S.3 enabled the admission of out of court statements made by a maker with personal knowledge of the contents who is unavailable to give evidence, provided that the statement was not made in contemplation of criminal proceedings (and would not otherwise be inadmissible therein). S.18 gave the trial judge a discretion to exclude any such statement from the jury, and s.19 enabled an appellate court to exercise an independent discretion on any appeal to it on the issue of admissibility. The operation of these statutory provisions was considered by the Court of Appeal in *R v Hovell* [1987] 1 NZLR 610. In that case, an 82 year old woman gave to a detective shortly after the event a detailed written account of indecencies perpetrated on her by a disguised intruder whom she was unable to describe in any detail. There was medical and scientific evidence corroborating recent sexual

activity. The next year, before the defendant's arrest, she died. Her statement was admitted in evidence. On appeal, it was submitted that it should have been excluded under s.18, in that "it would be contrary to the interests of justice not to exclude a statement dealing with facts of such central importance to the case" (p.612). The Court of Appeal dismissed the appeal, holding that there was no basis for limiting the admission of such statements "to less serious cases or to peripheral evidence", that the Act had its own safeguards for an accused, that it could not seriously be suggested that the complainant's account was "a fabrication, or that a woman of that age in those circumstances would complain of rape and the other sexual indignities if she had in fact consented", that the trial judge had rightly concluded that the identity of the assailant was the only issue for the jury and that the trial would be fought around the alibi claimed by the accused. The appeal was thus dismissed.

7. *R v Baker* [1989] 1 NZLR 738 concerned the common law principle whereby evidence of out of court statements may be admitted to show the maker's state of mind, where this is a relevant issue. The defendant was accused of having raped and then shot his estranged wife before attempting to commit suicide. His explanation was that she had invited him around to shoot stray cats, and that, after inviting him to consensual sex, she had then taken his gun and shot first him, then herself. To rebut this account, the prosecution wished to adduce evidence from several witnesses of statements made by the deceased in the previous month and as late as the afternoon before her death as to her extreme fear of the accused – which made it implausible to suggest that she would have invited him round to shoot stray cats or invited him to have sex. The trial judge refused to admit the statements, and the prosecution appealed. Giving the main judgment in the Court of Appeal allowing the appeal, Cooke P said (at p.741) that "At least in a case such as the present it may be more helpful to go straight to basics and ask whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards".

8. *R v Baker* and the later case of *R v Bain* [1996] 1 NZLR 129 were considered in *R v Manase* [2001] 2 NZLR 197, as were also the Canadian and Australian cases to which I have already referred. This was another case of an infant (aged three and a half) who was the alleged victim of sexual violation by rape and otherwise. She had made statements to her mother and a receptionist, which she could not now remember having made, as well as making certain drawings in the receptionist's presence. The trial judge had admitted evidence from the mother and receptionist about these statements and drawings. The Court of Appeal, reviewing the Canadian authorities, concluded that they had in practice diluted too far the concept of necessity (p.202). It noted certain recognised categories of exception to the hearsay rule, such as dying declarations and statements made as part of the res gestae. In other cases, the Court said, it was necessary to develop criteria for identifying when the rule might be displaced. I note, in parenthesis, that this is also the approach adopted by the federal Australian Evidence Act 1995 (above).

9. The criteria which the Court developed involved three distinct requirements: under the three distinct headings of *relevance* (although, as the Court noted, this is "an

affirmation and a reminder of the overriding criterion for the admissibility of all and any evidence"), *inability* (which the Court indicated should be approached strictly) and *reliability*. In relation to this last criterion, the Court said:

> "30. …The hearsay evidence must have sufficient apparent reliability, either inherent or circumstantial, or both, to justify its admission in spite of the dangers against which the hearsay rule is designed to guard. We use the expression 'apparent reliability' to signify that the judge is the gatekeeper and decides whether to admit the evidence or not. If the evidence is admitted, the jury or judge, as trier of fact, must decide how reliable the evidence is and therefore what weight should be placed on it. If a sufficient threshold level of apparent reliability is not reached, the hearsay evidence should not be admitted. The inability of a primary witness to give evidence is not good reason to admit unreliable hearsay evidence.
>
> 31. As a final check, as with all evidence admitted before a jury, the Court must consider whether hearsay evidence which otherwise might qualify for admission should nevertheless be excluded because its probative value is outweighed by its illegitimate prejudicial effect."

Reviewing the facts of *R v Manase,* the Court of Appeal concluded that there was a lack of sufficient apparent reliability in the primary utterances and drawings to qualify them for admission as hearsay. The appeal was therefore allowed.

ANNEXE 2

(See paragraph 77)

1. In *Unterpertinger v Austria* (1986) 13 EHRR 175 at paragraph 33 the Court held that there had been a breach of article 6(1), taken together with the principles inherent in paragraph (3)(d) where the conviction was based "mainly" on statements of two witnesses that had been read. The witnesses had exercised a legal right, as members of the applicant's family, to refuse to testify against him.

2. In *Bricmont v Belgium* (1989) 12 EHRR 217 at paragraph 82 the Court held that it was necessary to determine "to what extent" convictions had been based on accusations made by a witness whom the applicant had been unable to cross-examine, where the Court had not found justification for this.

3. In *Kostovski v The Netherlands* (1989) 12 EHRR 434 in finding a violation of article 6 the Court remarked at paragraph 44 that "the Government accepted that the applicant's conviction was based 'to a decisive extent' on the anonymous statements". The Court did not find justification for the procedures adopted, albeit that it recognised that "the growth in organised crime doubtless demands the introduction of appropriate measures" – paragraph 44.

4. In *Windisch v Austria* (1990) 13 EHRR 281 the Court held that there had been a violation of paragraph (3)(d) taken together with paragraph (1) of article 6 where the court had "relied to a large extent" on identification evidence in the form of statements to the police of two anonymous witnesses. They had been promised anonymity by the police because of fear of reprisals.

5. In *Delta v France* (1990 16 EHRR 574 at paragraph 37 the Court found that there had been a breach of paragraph (3)(d) taken together with paragraph (1) of article 6 where statements of two witnesses had been "taken into account…decisively…as the file contained no other evidence". There was no justification for the failure to procure the attendance of the witnesses.

6. In *X v United Kingdom* (1992) 15 EHRR CD 113 the Commission found that a complaint under article 6(1) and (3)(d) was manifestly ill-founded where it related to evidence given by anonymous witnesses where "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 identity of the witnesses had been concealed because of fear of reprisals.

7. In *Lüdi v Switzerland* (1992) 15 EHRR 173 the Court found a violation of paragraph (3)(d) in conjunction with paragraph (1) of article 6. The applicant had been convicted of drug trafficking. The evidence admitted at the trial had included reports made by an anonymous undercover police agent. While the Court found that there was justification for anonymity it ruled that this need not have precluded a procedure that permitted the witness to be questioned. The Swiss Government had argued that there had been no breach of article 6(1) and (3)(d) because the conviction had not been based to a decisive extent on the agent's evidence. The Court observed at paragraph 47 that, while the Swiss courts did not reach their decisions solely on the basis of the agent's statements, "these played a part in establishing the facts which led to the conviction".

8. In *Saïdi v France* (1993) 17 EHRR 251 the Court found that there had been a violation of article 6(1) and (3)(d). The applicant was convicted of drug dealing on the sole evidence of statements made to the police by three of his customers, who were identified. The Court did not find that there was any justification for failing to call them.

ANNEXE 3

(See paragraph 80)

1. In *Van Mechelen v The Netherlands* (1997) 25 EHRR 647 the applicants had been convicted of attempted manslaughter and murder, where the only evidence of positive identification was supplied by anonymous police officers whose evidence was not taken in the presence of the applicants or their counsel. The Court did not find that the procedure adopted was justified but, having cited the sole or decisive test as set out in *Doorson*, added at paragraph 63 that the conviction of the defendants was based "to a decisive extent" on the evidence of the police officers.

2. In *Craxi v Italy* (Application No 34896/97), 5 December 2002 the applicant was convicted solely on the basis of statements of co-defendants who exercised their rights not to give evidence. The Court held that there had been a violation of article 6(1) and (3)(d). Statements of one witness were read on the ground that he was untraceable. The Court held that these statements had not contributed to the applicant's conviction, so there was no need to consider his complaint that their admission had violated article 6(3)(d).

3. In *Kok v The Netherlands* (Application No 43149/98), Reports of Judgments and Decisions 2000-VI, p 597 the Court found the applicant's complaint of a violation of article 6(1) and (3)(d) to be manifestly ill-founded. The evidence placed before the court included a statement made by an informer. His identity was not disclosed in order to protect him from reprisals and the Strasbourg Court held that there was justification for this. In applying the sole or decisive test, the Court said this:

> "The Court therefore concludes that in the present case the applicant's conviction was not based exclusively or to a decisive extent on the evidence of the anonymous witness. 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."

4. In *Lucà v Italy* 36 EHRR 807 the applicant had been convicted on the sole basis of a statement of a co-accused, who had exercised his right not to give oral evidence and whom neither the applicant nor his counsel had had the right to question. The Court held that there had been a violation of articles 6(1) and 6(3)(d).

5. In *PS v Germany* (2001) 36 EHRR 1139 the applicant had been convicted of sexual assault on an 8 year old girl on the basis of statements that she had made which were the only direct evidence of his guilt, so that the conviction was based on the statements "to a decisive extent". She was not called to give evidence and the Court found that there were shortcomings in the procedure that had been used. The Court held that there had been a violation of paragraph (3)(d) taken in conjunction with paragraph (1) of article 6.

6. In *Visser v The Netherlands* (Application No 26668/95), 14 February 2002 the applicant's conviction had been based to a decisive extent on the statement of an anonymous witness who was not called to give evidence. The Court held that justification for this had not been demonstrated and that there had been a violation of articles 6(1) and 6(3)(d). The court recited the sole or decisive test. It also recited the passage from *Kok*, which I have quoted above.

7. In *Birutis and others v Lithuania* (Application Nos 47698/99 and 48115/99), 28 March 2002 the applicants had been convicted of taking part in a prison riot. A number of anonymous statements were admitted in evidence. The Court held that there was justification for the anonymity, but found a failure to take steps that were available to check the reliability of the statements. The Court found that one of the applicants had been convicted solely on the basis of such statement evidence, but that in the case of the other two such evidence had not been sole or decisive, but that the anonymous statements "were among the grounds" upon which their convictions were based – paragraph 32. A violation of article 6(1) and (3)(d) was found in the case of each applicant.

8. In *Krasniki v Czech Republic* (Application No 51277/99), 28 February 2006 the applicant was convicted of drug offences on the basis of the statement of an anonymous witness. The Court found a violation of article 6(1) and (3)(d) taken together. The Court was not satisfied that the anonymity was justified and also held that the applicant had been convicted solely or at least to a decisive extent on the anonymous evidence. Once again the Court recited the passage that I have cited from *Kok*: paragraph 79.

9. In *Taxquet v Belgium* (Application No 926/05), 13 January 2009 the applicant had been convicted of murder and attempted murder at a trial where the statement of an anonymous witness had been admitted. The Court was not satisfied that anonymity was justified. The Court was unable to determine whether the conviction was "based on objective evidence, or solely on the information supplied by the anonymous witness, or…solely on the statement by one of the co-defendants accusing him". The Court found a violation of articles 6(1) and 6(3)(d).

ANNEXE 4

(Prepared by Lord Judge – see paragraph 93)

1. In this annexe references to the "Domestic Position" refer to the position in England and Wales. With one or two exceptions, this document only addresses cases cited to the House in which the ECtHR found the European Convention on Human Rights ("the Convention") to have been violated. In relation to the non-violation cases, the purpose behind their inclusion is that they illustrate that the absence of a violation of article 6 entitlements may nevertheless produce a conviction which would be regarded domestically as unsafe.

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Unterpertinger v Austria (1986) 13 EHRR 175

2. This case involves known, absent witnesses; the applicant was convicted of causing actual bodily harm to his step-daughter on 14 August 1979 and grievous bodily harm (a fractured thumb) on 9 September 1979. During the first incident the applicant

himself received injuries. The police were informed by a neighbour. His wife was questioned as a suspect, and his step-daughter as a "person involved". They made statements about the incident. Shortly afterwards the second incident occurred. The applicant's wife received treatment for her injuries. The injury and incident were reported to the police by the hospital. In due course statements from the applicant and his wife were supplied by the hospital to the police. A judicial investigation into both incidents took place. During the investigation the wife gave an account of both incidents. She was later acquitted of criminal involvement in the first incident. When the wife and step-daughter were informed by the trial court of their right to refuse to testify against the applicant, they did so. This meant that their oral testimony was not available at trial, and indeed the interview conducted with the wife during the judicial investigation was also excluded. The prosecution adduced the earlier statements to the police by the wife and step-daughter. Evidence which was said to undermine their credibility was not admitted, although the statements in relation to the first incident had been obtained when they were questioned as a "suspect" and a "person involved" respectively.

3. Following a finding by the Commission that there was no violation, the ECtHR held that the applicant's rights under articles 6(1) and 6(3)(d) were breached. The applicant was "*convicted on the basis of 'testimony' in respect of which his defence rights were appreciably restricted*" (para 33).

Domestic Position

4. This trial would simply not proceed on this basis, and if it did, any conviction would be quashed.

5. The oral testimony of both the wife and the step-daughter is admissible. Both were available to give evidence, and they should have been called. Neither fell within the admissibility provisions in section 116. Any attempt to use the section 114(1)(d) route would have failed the "interests of justice" test. The statements before the trial court from the wife were incomplete, because her account to the investigating judge was not available. Yet every pre-trial statement of any witness should be available for cross-examination purposes. In any event, however, the applicant was prevented from challenging the credibility of the witnesses, or calling evidence to undermine it. No measures whatever were available or could be or were taken to protect the applicant's position. A conviction on the basis of the evidence admitted in this case would be unsafe: in reality there would have been no trial.

Bricmont v Belgium (1989) 12 EHRR 217

6. This conviction involved a known absent witness, the Prince of Belgium. He could not be summoned as a witness in the absence of a specific Royal decree. The trial court found that there was *"a clear and inexplicable want of diligence in seeking the truth"* (para 28) and noted that *"the persons best placed to provide information had been neither summoned nor examined as witnesses…"* (para 28(a)). The applicant was acquitted of criminal charges brought against him on the basis of financial mismanagement.

7. The acquittal was appealed by the prosecution. The Court considered "*regrettable that evidence had been taken from the Prince in an unusual manner…"* nevertheless, by allowing the prosecution to use the written statement of the alleged victim of the fraud without producing him for cross-examination because he was old and ill, the applicant was convicted.

8. The ECtHR held that in relation to the charges which had not been subject to the confrontation, there had been a violation of article 6(1) and (3)(d) taken together.

Domestic Position

9. Ignoring the complicating factor that in Belgium the victim's status as a member of the Royal Family gave him special privileges in the proceedings, which would not have been the case here, the admission of his untested evidence would have been highly unusual. The prosecution would have had to persuade the court that his written statement should be admitted under section 116(2)(b). In practical reality such an application would have been very surprising, and if made, would have failed the interests of justice test. There was no sufficient explanation for the inability of the witness to give oral testimony, and the trial court itself had serious reservations about the reliability of the evidence adduced from the complainant. If the Court of Appeal concluded that there had been a "*want of diligence in seeking the truth"* which was *"inexplicable*" or that the judge misdirected himself in relation to the "interests of justice" any conviction would be quashed as unsafe.

Kostovski v The Netherlands 12 EHRR 434

10. This case concerned absent, anonymous witnesses. The applicant was convicted by the District Court, and, later, the Amsterdam Court of Appeal of conducting an armed robbery. The applicant's conviction was based to a decisive extent on the statements of anonymous witnesses. Anonymous statements were made to the police and examining magistrates. The examining magistrate invited questions for him to put to the witness; of

the 14 questions submitted by the applicant's lawyers, only 2 were answered, on the basis that the remaining 12 may have breached the anonymity of the witness. The witnesses were not examined at trial. The witnesses' identities were not known either to the examining magistrates or to the trial courts. The magistrates testified that, on the basis of their assessments, the anonymous witnesses were "*not unreliable*" and "*completely reliable*".

11. The ECtHR held there had been a violation of articles 6(1) and 6(3)(d) taken together. At paragraphs 41 and 42, the Court noted that the use of statements acquired at the pre-trial investigative stage was not "*in itself inconsistent with paragraphs (3)(d) and (1) of article 6*" providing the defence had the opportunity to challenge and question a witness, but that, on this occasion, "*the nature and scope of the questions it could put* [via the examining magistrates earlier in the proceedings] *was considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved*". It is significant that the Court ascribed the problems associated with anonymous witnesses to the "decision" to render the witnesses anonymous; this suggests that the process by which the court arrived at the decision to grant anonymity was flawed, rather than the fact of anonymity per se.

12. The Court recognised the policy in favour of the use of anonymous evidence (para 44) but held that the general problems of anonymity were compounded by the absence of the anonymous witnesses at trial, and the subsequent admission of their evidence as hearsay – see para 43. However, in concluding that paragraphs (1) and (3)(d) of article 6 of the Convention had been breached, it is significant that the Court noted that "*the right to a fair administration of justice... cannot be sacrificed to* ***expediency***"(emphasis added); by contrast, the "relevant considerations" for the granting of anonymity, in section 5 of the 2008 Act, would not, on any reading, permit the granting of an order for reasons of "expediency".

Domestic Position

13. This case would not come to trial. If it did, it would be stopped. This evidence was "anonymous hearsay". The relaxation of some of the rules against the use of anonymous witnesses under the Criminal Evidence (Witness Anonymity) Act 2008 does not extend to witnesses who are not only anonymous but also absent. In *R v Mayers* [2008] EWCA Crim 2989; [2009] 1 Cr App R 403, para 113, the Court of Appeal (Criminal Division) addressed an application by the Crown that a written statement by an anonymous absent witness should be admitted in evidence and read to the jury, and summarised the principle:

> "…we are being invited to re-write the [Criminal Evidence (Witness Anonymity) Act 2008] by extending anonymous witness orders to permit anonymous hearsay evidence to be read to the jury. We cannot do so. Neither the common law, nor the [Criminal Justice Act 2003], nor the 2008 Act, permits it."

In short, such evidence is inadmissible.

Windisch v Austria (1990) 13 EHRR 281

14. The applicant was convicted of burglary on the basis of the anonymous, absent, testimony of two witnesses who had seen him in the vicinity of the area of the burglary, although they did not witness the crime itself. The witnesses were assured of anonymity by the police at the investigative stage, and their identity was kept from the Regional Court and the Supreme Court. On appeal, the Supreme Court refused the applicant's request to have the witnesses summoned, on the basis that he had not established how the witnesses would be identified sufficiently to allow the summonses to be served.

15. The ECtHR noted, at para 31, that although the anonymous absent witnesses had not witnessed the crime itself, their testimony became the "*central issue during the investigation and at the hearing*", and that the trial court relied, "*to a large extent*" on their testimony. Earlier in the judgment, at para 28, the Court stated that "*being unaware of their 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.*" As such, the evidence involved "*such limitations on the rights of the defence*" that there had been a violation of para (3)(d), taken together with para (1), of article 6.

Domestic Position

16. See paragraph 13 (above): the evidence would not be admissible.

Delta v France (1990) 16 EHRR 574

17. This matter concerned an absent, identified witness. The applicant was convicted at the Paris Criminal Court, and, subsequently, at the Paris Court of Appeal and the Court of Cassation of the robbery of jewellery from two identified teenage girls. Upon being searched following his arrest, nothing incriminating was found on the applicant. The victims were the only witnesses, and, having provided statements to the police, failed to respond to court summons to attend as witnesses at the applicant's trial. No reasons were given for their failure to do so. At the trial of first instance, the trainee barristers representing the applicant made no submissions in relation to the absent witnesses.

18. In upholding the conviction, the Paris Court of Appeal held that the absent witnesses' statements "*satisf*[ied] *the Court that the defendant was guilty of the offences charged and* [made] *the requested examination of the witnesses unnecessary*" (para 20). The Court of Cassation refused to intervene in the "*appeal court's final assessment of all the evidence adduced*" and dismissed the appeal.

19. The ECtHR noted, at para 37, that neither the applicant nor his counsel ever had an adequate opportunity to examine witnesses whose evidence was taken into account "*decisively at first instance and on appeal, as the file contained no other evidence. They were therefore unable to test the witnesses' reliability or cast doubt on their credibility*…" The Court concluded that there had been a breach of article 6(3)(d) taken together with para (1).

Domestic Position

20. The absence of the crucial witnesses for the prosecution was unexplained and unjustified. No attempt was made to trace them or compel their attendance, or to justify the reading of their statements. No countervailing measures to protect the interests of the defendant were or could be taken. An application for this evidence to be read would have failed the interests of justice test. Therefore if the case had proceeded to trial it would have been stopped, but if that safeguard had failed, and the case had resulted in a conviction, the conviction would have been quashed.

Lűdi v Switzerland (1992) 15 EHRR 173

21. This case concerned an anonymous, absent witness. The applicant was convicted of drug trafficking offences on the basis of the evidence of an absent and unidentified

undercover police officer, operating with requisite official authorisation. The undercover officer initiated a series of meetings with the applicant in which, the officer testified, the applicant offered to sell large quantities of cocaine. The applicant was convicted by the District Court and, subsequently, by the Bern Court of Appeal and the Federal Court. In order to preserve his anonymity, the undercover officer was not called at trial; the court considered that telephone intercept records and the reports of the undercover agent were sufficient to establish the applicant's criminality.

22. The Commission stated (at para 87) that the applicant did not have the opportunity to challenge and question the undercover officer, and noted that, while the applicant was convicted partly on the basis of his own admissions, those admissions were made when the applicant was confronted with intercept evidence by the undercover officer which he was unable to challenge in the trial proceedings. The Commission concluded that there was a breach of article 6(3)(d) taken together with article 6(1).

23. The ECtHR noted the operational requirement of law enforcement agencies to undertake intrusive and covert surveillance, but found that it would have been possible to preserve the anonymity of the undercover officer while simultaneously affording the applicant the opportunity to question him, or cast doubt on his credibility (para 49). This failure constituted a breach of article 6.

Domestic Position

24. See paragraph 13 (above): the evidence would not be admissible.

25. In this particular case it is possible to go a little further: there was no reason to conceal the appearance of the undercover police officer from the applicant who had met him under his assumed identity on a number of occasions. So a witness anonymity order to preserve the true identity of the officer would nevertheless not prevent him from testifying in court, and therefore cross-examined and challenged on the applicant's behalf. It has already been recognised that:

> "In relation to police officers the normal problem is not quite the same as that envisaged by orders for witness anonymity which were considered at the trial of *Davis*. These witnesses may well be known to the defendant by a false identity, or are using a false identity. Knowledge of their true identities can rarely be of any importance to the defendant, who can advance whatever criticisms of the

> evidence, or indeed the conduct of the officers, while they continue to be known by their false identities" (*R v Mayers* [2009] 1 Cr App R 403, para 31).

Effectively, the approach domestically and in Strasbourg would have been identical.

It is unnecessary to address the admissibility of the telephone-tap evidence: it is, to put it no higher, extremely unlikely that this evidence would have been admissible.

Saïdi v France (1993) 17 EHRR 251

26. This case involved identified, absent witnesses. The applicant was convicted in the Nice Criminal Court and, later, the Court of Appeal and Court of Cassation of the involuntary homicide of a fellow drug user, who died following the administration of drugs provided by the applicant. During the judicial investigation for that and other drugs-related charges, the applicant was remanded in custody; one of the reasons for the detention at the time was the need to arrange witness confrontations. During his detention, the applicant was identified through a two-way mirror by suspects detained by the police on other charges relating to drugs (see para 10) as the person responsible for providing them – and the deceased – with drugs. At trial and before the Court of Appeal, the applicant was convicted on the basis of statements made by these witnesses, who were absent from the trial. There was no positive attempt to conceal their identity nor to discuss the possibility of using other special measures, and on appeal no specific request was made for a confrontation. Nevertheless, stress was laid on Saïdi's behalf on the inadequacy of the investigation and the absence of any confrontation between him and his accusers. The Court of Cassation refused to interfere with the verdicts below.

27. The Commission noted (at para 44), that the applicant had been accused by "*his habitual* [drug] *clients and by the very persons who carried out some of his deliveries*." It also noted that the applicant was found guilty on the sole basis of the statements of his accusers, and continued, "*the applicant should have been given the opportunity of being confronted with his accusers and thus enabled to put his own questions and comments about their statements*." It concluded that there had been a violation of article 6.

28. Before the ECtHR, France argued that oral testimony was not required because (i) the file against the applicant was complete and confrontations would have served little purpose; and (ii) of the general difficulty of obtaining testimony from drug addicts, who may be fearful of reprisals arising from their cooperation with the authorities, made organising confrontations a sensitive matter. However no specific assertion was advanced that any of the witnesses was in fear of the applicant, or indeed his colleagues.

29. The ECtHR found (at para 44) that the convicting courts referred to no evidence other than the statements obtained prior to trial after the two-way mirror identification. It also noted that the convicting courts themselves highlighted the relationship the witnesses bore to the applicant, namely that they were some of his regular customers and were those responsible for delivering consignments of drugs to other users. The failure to enable the applicant to examine the witnesses either at the investigative stage or at trial constituted a breach of article 6(1) and (3)(d).

Domestic Position

30. This evidence would not be admitted. There was no good reason why the key witnesses could not be called and cross-examined. Many witnesses in this class of case are reluctant to give evidence, but that does not constitute a sufficient basis for allowing hearsay evidence and disabling the defendant from challenging the evidence. In these cases witnesses are expected to give evidence: witness reluctance does not provide a sufficient basis for their absence, and in any event many of the concerns expressed by witnesses can be addressed by special measures. The crucial point is that the evidence of these witnesses was in issue, they were closely involved in the same drugs related question, and the circumstances in which their purported identifications took place required close examination. No countervailing measures offering appropriate protection to the applicant's interests were available. The interests of justice required their oral testimony or the exclusion of their evidence.

Doorson v The Netherlands (1996) 22 EHRR 330

31. This case concerned a combination of absent, identified, and anonymous witnesses. The applicant was convicted before the Amsterdam Regional Court and, later, by the Court of Appeal and the Supreme Court of drug trafficking. The applicant was identified from a photograph as a drug dealer by a number of witnesses who were known to be drug users.

32. Six of the witnesses who identified the applicant remained anonymous; the identity of a further two was disclosed. At first instance trial, the defence applied unsuccessfully for the court to summon the anonymous witnesses. Of the two identified witnesses, only one appeared at trial, initially testifying that he did not recognise the applicant. The witness subsequently purported to recognise the applicant when presented with the photograph from which he originally recognised him, though later admitted that he could not be sure, and that the reason he identified him to the police was in order to be reunited with his confiscated drugs. The evidence of a second absent but identified witness was read. The defence also questioned the failure of the prosecution to disclose

details arising from identification of the applicant from photographs. The applicant was convicted.

33. The Court of Appeal requested the investigatory judge (who had been a member of the court in an earlier constitution of the Regional Court) to re-examine the need for the witnesses' continued anonymity and to question them on the applicant's behalf. Two of the six anonymous witnesses attended the hearing before the investigatory judge. Their anonymity was upheld. They were questioned extensively by the judge and the applicant's lawyer. They re-identified the applicant from photographs put to them. In view of this questioning, and the fact it was not possible to secure the attendance of the remaining witnesses, the investigatory judge and Court of Appeal refused the applicant's request to re-summon all anonymous witnesses. The Court of Appeal and, later, the Supreme Court, upheld the conviction.

34. The Commission found by a majority there had been no breach of the Convention.

35. In summary, the conviction was based on (a) the oral evidence of one prosecution witness who deposed at trial, and retracted his statement to the police: (b) two anonymous witnesses who deposed orally and whom the defence could cross-examine: (c) one witness who made a statement to the police and then disappeared.

36. The ECtHR found there was no breach of article 6(1) and (3)(d). In relation to anonymous witnesses, it articulated the following doctrine, at para 76,

> "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…"

37. The Court continued that evidence obtained from witnesses, at para 76,

> "under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. The Court is satisfied that this was done in the criminal proceedings leading to the applicant's conviction, as is reflected in the express declaration of the Court of Appeal that it had

> treated [the anonymous testimony] 'with the necessary caution and circumspection'."

The Court held that the testimony from the absent but identified witness caused the applicant no unfairness because it was impossible to trace the witness, and the evidence was corroborated by other evidence before the court (para 80). In conclusion, therefore, the Court considered, "*None of the alleged shortcomings considered on their own lead the Court to conclude that the applicant did not receive a fair trial. Moreover, it cannot find, even if the alleged shortcomings are considered together, that the proceedings as a whole were unfair...*"

Domestic Position

38. See paragraph 13: the anonymous witnesses did not give oral testimony at trial. Their evidence would not be admissible. The evidence of the witness who retracted his statement would have been judged by the jury. Given that the statement he made incriminating the applicant was rejected, the reliability of his allegations against the applicant would have been in serious doubt.

39. In relation to the identified witness who disappeared his written statement might have been admitted under section 116(2)(d) of the 2003 Act if the court had been satisfied all reasonably practicable steps had been taken to find him. However given that the witness was a known drug user, and the allegation against the applicant was drug trafficking, the absence of any opportunity for the defence to challenge the evidence would probably have led the court to exclude it.

40. A conviction would be most unlikely: and the case would probably be stopped.

Ferrantelli and Santangelo v Italy (1996) 23 EHRR 288

41. This matter involved an absent, identified witness. The applicants, who were aged 17 and 18 at the time of the offence, were convicted of the murder of two police officers following statements provided to the police by a co-accused. The co-accused died before trial and before the applicants had the opportunity to examine him. During police questioning, the applicants admitted involvement in the attacks, but gave conflicting accounts and later claimed ill-treatment. Three trials took place. The applicants were convicted 16 years following their initial arrest.

42. The Commission upheld the applicants' complaints that there was excessive delay, in breach of article 6(1), and that the reliance on the statements of the deceased co-accused was objectionable. The Commission held that the admission of the deceased's statements was not per se objectionable, but that, at para 51, given the confession evidence taken with the evidence of the deceased co-accused constituted "*the fundamental grounds for their conviction*", there was a breach of article 6(1) of the Convention.

43. The ECtHR held that the delay amounted to a breach of article 6, in relation to the length of the proceedings, but that the reliance on the statement of the deceased co-accused was compatible with the right to a fair trial contained in paragraphs (1) and (3)(d) of article 6. The reasoning for the latter conclusion appears to be because the Government could not be held responsible for the deceased's death, and the fact that his evidence was corroborated by the applicants' admissions to the police, other circumstantial evidence, and the lack of an alibi for either of them (see para 52).

Domestic Position

44. Although this is a "non-violation" case, it is worth noting that domestically, a trial taking place 16 years after the initial arrest of the defendants would almost certainly lead to an abuse of process argument, reinforced by the fact of prejudice to the defendants from their inability to cross-examine a co-accused whose statements to the police were relied on in support of the allegation against them.

45. For the same reason, given the absence of any opportunity for the defendants to test the accounts of the deceased co-accused, although section 116(2)(a) provides that the statement of an identified, absent witness may be admitted as hearsay evidence where the witness is dead, admission in these circumstances would be likely to fail the interests of justice test under the 2003 Act and the fairness test under section 78(1) of the 1984 Act. In practice therefore the outcome of this case would have coincided with the decision of the Commission rather than the ECtHR itself.

Van Mechelen and others v The Netherlands (1997) 25 EHRR 647

46. This case involved anonymous absent witnesses. The applicants were convicted of armed robbery and attempted murder on the basis of anonymous statements from police officers. The police officers were questioned by the investigatory judge in the shielded presence of the applicants and their lawyers who could hear but not see them. The officers did not testify at trial.

47. The Commission held by a majority that there had been no violation of article 6(1) and (3)(d), noting, at para 77, that "*article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court*" and, at para 79, that the applicants were suspected of having committed serious offences of violence.

48. Although anonymous testimony was received by an investigatory judge, it had been possible to challenge that evidence, (para 82) the Commission concluded that the applicants' convictions "*did not solely rest on the statements by these unidentified witnesses*", and continued to outline corroborative evidence, including tapped telephone conversations (para 84).

49. The ECtHR noted that special considerations apply where witnesses seeking anonymity were members of the police force of the State. The Court stated at para 60 that it had not been explained "*to the Court's satisfaction*" why it was necessary to resort to what it termed "*such extreme limitations*" and "*why less far-reaching measures were not considered*". The Court implied that it was not opposed to anonymous police testimony per se but that under the circumstances of the case, it had not been persuaded it was necessary; "*in the absence of further information, the Court cannot find that the operational needs of the police provide sufficient justification* [for anonymity]".

50. The alleged threat of reprisals arising from testimony had not been assessed properly; anonymity was granted simply on the basis of the seriousness of the crime committed (para 61). Accordingly, the Court found that the convictions of the applicants were "*based 'to a decisive extent' on… anonymous statements*" and concluded that the proceedings "*taken as a whole*" were not fair (paragraphs 63 and 65), and there was a breach of article 6(1) taken together with article 6(3)(d).

Domestic Position

51. Before considering whether it would be legally possible to apply for mass police anonymity, it is useful to consider whether such an application would actually be made, and whether those responsible for the application would deem such an application to be reasonable. In August 2008, the Director of Public Prosecutions issued *Guidance on Witness Anonymity*[1] which states, under the section titled *Considering whether to make an application*,

[1] http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html#_08

> "Prosecutors must also be able to show that any fear expressed by the witness that they, or any other person, would suffer death or injury, or that there would be serious damage to property, if they were identified to the defendant, **is reasonable**" (emphasis added).

In this case it is open to very serious question whether an application for police anonymity would be made at all.

52. The Criminal Evidence (Witness Anonymity) Act 2008 contains no specific statutory provision relating to the anonymity of police officers: see para 25 (above) for further comment.

53. In the result, the conditions which would permit consideration to be given to the making of witness anonymity orders in this case were not established. Even on the basis that the justification for anonymity could be justified, the witnesses would nevertheless have been required to give oral testimony at trial, probably with the protection of special measures for them, which kept open the possibility of cross-examination and challenge on behalf of the defendant. Incidentally, the views of the investigating judge about the credibility of the witnesses would be irrelevant and inadmissible: all decisions on credibility are the exclusive function of the jury on the basis of the evidence before them.

54. In reality, from the point of view of a trial before the jury, the way in which the evidence in the present case was actually presented – that is, critical evidence from anonymous witnesses who were not present at trial – would, even if permitted, have resulted in the quashing of any conviction. In effect, see paragraph 13: the evidence would not be admissible.

AM v Italy (Application No 37019/97), 14 December 1999

55. The applicant was convicted of sexually assaulting G during a school trip G made to Italy. On his return to the United States G provided a detailed account of what took place to a US police officer. His father confirmed in interview that the child had made the complaint. G's mother and G's psychotherapist provided written statements confirming that G had recited to them the allegations against the applicant. The record of the account given by G and the other statements were used in evidence against the applicant. This case involved absent but identified witnesses. The international rogatory letter issued by the authorities in Italy explicitly asked the authorities in the USA to arrange for the witnesses to be questioned without a defence lawyer being present.

56. The ECtHR concluded, at para 26,

> "in convicting the applicant… the domestic courts relied solely on the statements made in the United States before trial and the applicant was at no stage in the proceedings confronted with his accusers…"

57. There was a breach of article 6(1) taken together with article 6(3).

Domestic Position

58. Section 116(2)(c) of the CJA 2003 permits the admission of hearsay evidence where "*the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance*". Before evidence can be introduced in this way it is necessary to show (a) that all reasonable steps have been taken to secure the presence of the witness; and (b) why those steps have failed. Moreover, assuming that this hurdle is cleared, it would then be necessary for the prosecution to show why other methods by which the evidence could be given, such as by means of a live link, would be impracticable.

59. Assuming that none of these steps to enable the jury to see the witness, or to enable the witness to be confronted by the defence could be taken, the starting point is that the statements of the father, mother and psychotherapist all constitute multiple hearsay obtained in circumstances where the investigating authorities expressly sought to arrange for the absence of a defence lawyer. In the circumstances of this case, that would have been likely to produce a decision under section 78 of the Police and Criminal Evidence Act 1984 excluding the evidence. But, if such an order were not made on the basis that the defendant's lawyer did not press sufficiently for the opportunity to be present, the admission of the evidence would have been questioned as a step inconsistent with the interests of justice and section 78 would also have been engaged in the context of the adverse effect on the fairness of proceedings resulting from the admission of this evidence. The reality is that (a) the defendant could not defend himself against the allegations and (b) the jury would have no basis for making any assessment about the credibility and reliability of the makers of the statement. If the judge admitted the evidence he would have had to give the jury such clear directions about the dangers of convicting on the basis of such remote and untested evidence, that either (a) an acquittal would have been inevitable or (b) the Court of Appeal would quash the conviction on the basis, first, that the evidence should never have been admitted and, second, because the consequent conviction was unsafe.

Lucà v Italy (2001) 36 EHRR 807

60. This case involved an absent, but identified, witness. The applicant was convicted of drugs offences by the Locri Criminal Court and, later, the Court of Appeal and the Court of Cassation. An acquaintance of the applicant from the drugs world, N, made statements to the police, whilst detained as a suspect himself, which implicated the applicant. Italian law deemed N to be a "*person accused in connected proceedings*" against the applicant and, accordingly, N was permitted to refuse to testify. Further domestic provisions, triggered by N's testimonial immunity, allowed the prosecution to read N's statement to the Court.

61. Before the ECtHR the Italian Government argued that the domestic provisions highlighted the tension between the right of a co-accused to remain silent, the right of the accused to question a witness against him, and the right of the judicial authority not to be deprived of evidence obtained during the investigation. In its summary of the facts, the ECtHR, at para 14, stated "*as a result* [of the testimonial immunity provisions], *the accused was deprived of any opportunity of examining* [N] *or of having him examined*."

62. It was irrelevant that the statements had been made by a co-accused rather than a witness; this illustrates the principle, found in many judgments relating to article 6(3)(d), that the term "*witness*" has an autonomous meaning within the Convention system. N, a co-accused, was therefore a witness for these purposes. Accordingly, the Court was not "*satisfied that the applicant was given an adequate and proper opportunity to contest the statements on which his conviction was based*" and there had been a breach of article 6(1) and (3)(d).

Domestic Position

63. Although described as a "co-accused", it appears from the judgment that the witness was an accused in a related but separate case. That said, he was entitled to and would have been warned that he was not obliged to give evidence which might incriminate him in any offence. Assuming that he elected not to give evidence, any oral statement he made during the police investigation would not have been admissible. An application could have been made for any written statement, taken in proper form, to be read to the jury. The evidence would not have been admissible under section 116, but the prosecution might have argued for its admissibility under section 114(1)(d).

64. In exercising his discretion whether to admit the evidence, the judge would have been alert to the dangers of admitting a statement made by a suspect who had exercised

his right not to incriminate himself, and thus avoiding any challenge or cross-examination. That consideration would then bear on issues of the potential unreliability of the maker of the statement, and the difficulties faced by the defendant, unable to meet the allegation head on, and the prejudice which would be likely to be occasioned to him. All these would provide overwhelming reasons against permitting the statement of the witness to be read. If nevertheless admitted, the judge would have been required to give the clearest possible warnings against the jury relying on this evidence, but if the jury had convicted, the Court of Appeal could almost certainly question whether (a) the decision to admit the evidence was correct: (b) whether the warnings to the jury were in sufficiently clear terms: and (c) whether the conviction was nevertheless a safe one. In short, a conviction might in theory have been open: in reality there would have been none, and the prosecution would almost certainly have failed to persuade the court to admit the evidence in the first place, and any conviction would be regarded as unsafe.

PS v Germany (2001) 36 EHRR 1139

65. This case involved an absent, identified witness. The applicant was convicted of a sexual offence against an 8 year old girl, S. The applicant was her private music teacher. Her father reported to the police that the applicant had abused her during a music lesson. S and her mother were questioned at the police station. S confirmed her father's allegation. Her mother stated that S had been very disturbed after her music lesson and that she had later confided in her mother, presumably that she had been assaulted. At trial a request on the applicant's behalf for a psychological expert opinion regarding the credibility of S's complaints was rejected. The court believed that it was not reasonable to hear the evidence from the complainant herself, on the basis that her recollection had been repressed and if she were reminded of it, or required to remember it, her personal development would be seriously impaired.

66. The Regional Court dismissed an appeal against conviction. The applicant's guilt was established on the basis of the statements made by the complainant's mother and the police officer as well as a psychological expert opinion on S's credibility which was prepared for the appeal process. There was medical evidence before the Regional Court confirming the likely deterioration of S's health if she gave evidence of the assault.

67. Following the alleged sexual assault, S and her mother were questioned at a police station. The parents of S provided statements to the police as to her condition and state immediately following the assault, but did not allow her to testify at trial on account of the distress that it would cause her to recount the events in court. The trial court refused the applicant's request to appoint an expert to determine the credibility of S's statements, holding that its own professional experience in evaluating statements made by children was sufficient. The trial court also noted that if S were to be examined as a witness, rather than contributing to a further clarification of the facts, it would, by contrast, seriously impair her personal development.

68. The ECtHR concluded that a conviction based on this evidence involved *"such limitations on the rights of the defence"* that the trial was unfair. No counterbalancing measures could be taken to address the limitations on the rights of the defence, and the decision of the District Court to refuse to hear the oral testimony of the child or to appoint the expert requested by the defence were *"rather vague and speculative".* There was, accordingly, a violation of article 6(1) and (3)(d).

Domestic Position

69. This conviction of a sexual offence against a child was based on the hearsay evidence of her mother, a police officer, and a psychological expert, who all reported what the child had said. There was no evidence to suggest that the child could not have been called, subject to special protective measures, as a prosecution witness. Therefore, apart from the mother's evidence of her daughter's condition on her return home after the music lesson, none of the material on which this conviction was based would be admitted. The child's accounts to the police and her mother and the expert were hearsay. The evidence of the expert about the child's credibility would also have been inadmissible; in effect such evidence would usurp the responsibility of the jury.

Visser v The Netherlands (Application No 26668/95), 14 February 2002

70. This case involved a conviction for kidnapping, based to a decisive extent on the evidence of an anonymous witness who was not called to give evidence on the basis of his/her fear of reprisals from the applicant's co-accused. Six years after the offence was committed, as the case progressed through the system, the anonymous witness was questioned before an investigatory judge, and his counsel was given a limited opportunity to provide questions for the judge to put to the witness.

71. The ECtHR found, para 47, that the investigatory judge did not show how he assessed the reasonableness of the personal fear of the witness *"either as this had existed when the witness was heard by police or when s/he was heard by the investigating judge nearly six years later."* Moreover *"…an examination into the seriousness and well-foundedness of the reasons for the anonymity of the witness when it decided to use the statement before the investigating judge in evidence…"* was not carried out.

72. The ECtHR did not appear to object to the use of anonymous witnesses per se; rather it was the case that, at para 48,

> "**In these circumstances** the Court is not satisfied that the interest of the witness in remaining anonymous could justify limiting the rights of the defence to the extent that they were limited…" (emphasis added).

Domestic Position

73. See paragraph 13: the evidence of any absent anonymous witness would not be admissible. The evidence of a witness who gives oral testimony at trial may be given anonymously. Before such evidence can be admitted at all, a robust analysis of the need for his or her anonymity is required by the Criminal Evidence (Witness Anonymity) Act 2008. The prosecutor must, unless the court directs otherwise, inform the court of the identity of the witness (section 3(2)). The court must be satisfied that the measures proposed are necessary: that if adopted they would be consistent with the defendant receiving a fair trial: and that without an anonymity order, the witness would not testify (section 4). The court must examine the credibility of the witness, and whether and if so how it could be properly tested without disclosure of his or her identity (section 5). Thereafter, even with the use of special measures, such as screening, the defence would be enabled to challenge the evidence.

74. In short, for this evidence to be admitted the judge would have had to make a reasoned finding that the necessary conditions were satisfied.

75. It is highly unlikely that a domestic court would find that the necessary conditions were satisfied, but in any event in accordance with the reasoning of the ECtHR, if a proper examination of the facts or a reasoned decision about whether to admit this evidence were lacking, the conviction would be unsafe.

Birutis and others v Lithuania (Application Nos 47698/99 and 48115/99), 28 March 2002

76. This case involves the use of anonymous, absent witnesses resulting in the conviction of three applicants, A, B, and C, for taking part in a prison riot. The evidence against A and B included testimony given by other co-accused, circumstantial evidence, in addition to the statements of a variety of anonymous witnesses, believed to be fellow inmates at the prison. The Regional Court referred to the statements of 17 and 19 anonymous witnesses when convicting A and B respectively. When convicting C, the Regional Court referred solely to the statements by six anonymous witnesses recorded by the prosecution during the pre-trial investigation.

77. The ECtHR noted that anonymous evidence may be appropriate in some cases, especially in the instant cases, where prisoners may fear testifying against fellow detainees. However, it noted, at para 30, that "*this circumstance, as such, could not justify any choice of means by the authorities in handling the anonymous evidence*." At para 31 the ECtHR noted that applicant C was convicted solely on the basis of anonymous evidence; although he had been permitted to question three other witnesses in open court during the trial, the domestic courts did not base his conviction on any evidence given by those witnesses.

78. The Court noted that the convictions of applicants A and B were not "*based solely, or to a decisive extent, on the anonymous evidence*" but that because there were a high number of anonymous statements, "*the trial court effectively demonstrated that the statements in question were among the grounds upon which the first and second applicants' conviction was based*" (para 32). As such, the Court looked for counterbalancing measures to offset the handicap suffered by the defence; it did not find adequate measures.

79. The Court noted at paragraphs 33 and 34 that A and B had alleged that there were inconsistencies in the anonymous statements. There was a basis to suspect the authorities had collaborated with the makers of the statements to implicate the applicants; this was evidenced by the fact that the witnesses who did testify at trial sought to retract their original statements implicating the applicants, claiming they had been made under pressure from the prison authorities. In fact, the trial courts held that their original testimony was more reliable, and discarded the revised testimony. Despite these genuine concerns as to the credibility of the anonymous witnesses, A and B were not permitted to question them. The domestic courts did not avail themselves of their statutory power to question the witnesses. In addition, there was no scrutiny by the courts of the decision to grant anonymity. As such, "*the handicaps on the first and second applicants' defence rights were not counterbalanced by the procedures followed by the domestic judicial authorities…*" There was a breach of article 6.

Domestic Position

80. The prosecution case against some defendants depended exclusively on anonymous hearsay evidence, and against others, largely of anonymous hearsay, that is anonymous absent witnesses. See paragraph 13: the evidence would not be admissible.

81. Assuming that any individual witness were available to be called at trial, an application for his anonymity would have required the process identified in paragraph 73 (above) to be engaged. It was essential that the defendant should have the opportunity of challenging this evidence, not least because, by definition, they would almost certainly

(as prisoners, unless individuals of good previous character on remand) have had previous criminal convictions, which the defendant might have wished to explore before the jury. Assuming that this case had proceeded before the jury on the basis of the process before the regional court in Lithuania, even if the judge had admitted any of this evidence, he would have been required to give the jury a most solemn warning about the dangers of relying on evidence which the defendant could not test, and assuming that the jury disregarded his warnings, the overwhelming likelihood is that without any further evidence (and as far as we can see there was none which the jury could have relied on) the convictions would be unsafe.

Sadak and others v Turkey (2003) 36 EHRR 431

82. The applicants were former Turkish parliamentarians convicted of membership of an armed gang, on account of their involvement in the Peoples' Democratic Party, which the domestic courts held to be "*separatist activity*" linked to a paramilitary campaign for the creation of a separate Kurdish state (para 17). Legal argument took place as to the classification of their offences under terrorism or treason provisions; different charges were brought in the course of the proceedings. The applicants were acquitted of treason charges, which attracted the death penalty.

83. At trial, the prosecution had refused to call some witnesses on account of their fear of sectarian violence; others were not requested by the applicants at trial. The case therefore involved known, absent witnesses. Argument before the ECtHR addressed, *inter alia*, whether the absence of those witnesses breached article 6(3)(d).

84. The ECtHR noted that in some circumstances, "*the judicial authorities may find it necessary to use statements obtained at the preparatory investigation stage…provided the accused has had an adequate and sufficient opportunity to challenge the statements at the time they were made or at a later date…*" However, the Court stated that the domestic court gave a *"determining weight"* to certain statements made by witnesses which the applicants were not able to examine or challenge.

Domestic Position

85. Assuming that it was established that the witnesses were fearful of giving evidence within the context of section 116(2)(e) of the 2003 Act, the additional admissibility criteria in section 116(4) would have to be addressed. The application to adduce this evidence would fail, first, because there had been no adequate investigation into the reasons why the witnesses' attendance at court to give oral testimony, if

necessary using special measures available for fearful witnesses, was justified, and, second, because the admission of this evidence, given the difficulty faced by the defendant seeking to challenge it, would be likely to produce an unfair trial.

Krasniki v Czech Republic (Application No 51277/99), 28 February 2006

86. This case concerns anonymous witnesses, one present and one absent from trial. The applicant was convicted of drugs offences. During the pre-trial judicial investigation, two anonymous witnesses, both of whom were drug users, were questioned. The applicant's lawyer was permitted to ask questions relating to, amongst other matters, why the witnesses sought anonymity. In reply they stated they were in fear of reprisals for speaking to the authorities, and one of them owed money for drugs. One of the anonymous witnesses testified at trial, but, because the other could not be located, her testimony was read to the court. The testimony alleged that drugs had been purchased from the applicant.

87. Before the ECtHR, the applicant argued that the need for anonymity had not been tested properly and the authorities should have made greater efforts to assess the witnesses' fear of reprisals. The applicant also challenged the prosecution's failure to disclose the criminal record of one of the anonymous witnesses who was, it emerged, being held in the same prison as the applicant. He also highlighted discrepancies between some aspects of the testimony of the witnesses that should have led to the prosecution assessing the witnesses' credibility in further depth.

88. The Court held that there had been a breach of article 6(1) and (3)(d), and noted, at para 81, that the authorities had attempted to approach the anonymous testimony with some caution, but that it was not clear how the investigating officer and the trial judge assessed the reasonableness of the personal fear of the witnesses in relation to the applicant. The conclusion at para 83 was that,

> "the Court is not satisfied that the interest of the witnesses in remaining anonymous could justify limiting the rights of the applicant to such an extent…

Domestic Position

89. See paragraph 13: the evidence of an anonymous absent witness would not be admissible.

90. In any event, so far as the witness who gave oral evidence, but anonymously, no proper foundation for his anonymity was established. The strict conditions in the 2008 Act were not met: his evidence, too, would therefore not have been admitted.

Taxquet v Belgium (Application No 926/05), 13 January 2009

91. This case concerns an absent, anonymous witness. The applicant was convicted of being a principal party to the 1991 murder and attempted murder of a Belgian government minister and his partner respectively. An anonymous informant, whose identity was known only to the police, provided detailed information implicating several of the 8 people who would be the co-defendants in the case. Only one aspect of the information implicated the applicant.

92. At trial before the Assize Court, the applicant unsuccessfully applied for an investigating judge to question the original anonymous witness. In refusing the request, the Assize Court held that the information had "*no probative value as such. In the present case it simply constituted information capable of giving fresh impetus or a new slant to the investigation and leading to the independent gathering of lawful evidence*." The Assize Court also stated that the court was unaware of the identity of the witness in any event and "*regardless of the grounds* [for maintaining anonymity] *relied upon by the investigating authorities… it does not appear useful for establishing the truth and would delay the proceedings needlessly…"* (para 12).

93. Before the Chamber, the applicant complained that his article 6 rights had been breached in relation to: (i) the inadequate reasoning given by the jury; and (ii) the reliance on anonymous witnesses. It appears that this is the first reported instance at Strasbourg of the "sole or decisive" test being linked to the extent to which the jury are obliged to give reasons for their conclusions. In holding that the applicant's article 6 rights were breached, the Chamber appears to have considered the issues being interrelated. It may be helpful to quote the summary of the applicant's position in full, taken from para 55,

> "The applicant contended that the question of the anonymous witness testimony took on particular significance in his case as it was linked to the preceding complaint concerning the lack of reasoning in the Assize Court's judgment. In order to be able to find that a witness statement had played a decisive role in a person's conviction, it was necessary to know the reasons for the decision, but in the present case none had been given. If the reasoning had been known, it might have been possible to identify the information received anonymously as having

> been a decisive factor, or the sole factor, in establishing his guilt."

94. The ECtHR did not rule out the use of anonymous statements per se, rather, it stipulated the process by which the informant's anonymity should be granted. No such process was followed in the instant case. At para 64 the Court stated,

> "anonymous **statements** should be examined by a judge who knows of the identity of the witness, has verified the reasons for granting anonymity and is able to express an opinion on the witness's credibility in order to establish whether there is any animosity between the witness and the accused." (Emphasis added).

95. In relation to whether the evidence of the anonymous informant was sole or decisive, the Court stated that the Government had *"not produced anything to show that the finding of the applicant's guilt was based on other real evidence, on inferences drawn from the examination of other witnesses or on other undisputed facts"* (para 66). It concluded that the applicant's misgivings in relation to the use of the anonymous witness were justified, and accordingly, there was a violation of article 6(1) and (3)(d) of the Convention.

Domestic Position

96. See paragraph 13: the statement of an absent anonymous witness would not be admissible. Even if present, anonymity is only permitted under strict conditions and subject to countervailing safeguards for the defendant. In any event, on the basis of this evidence, this case would not have proceeded to trial. Any conviction would have been unsafe.

LORD BROWN

112. I am in full agreement with the judgment of Lord Phillips. I wish, however, to add a few paragraphs of my own.

113. These appeals are of the utmost importance. If the Strasbourg case law does indeed establish an inflexible, unqualified principle that any conviction based solely or decisively on evidence adduced from an absent or anonymous witness is necessarily to be condemned as unfair and set aside as contrary to articles 6(1) and 6(3)(d) of the Convention, then the whole domestic scheme for ensuring fair trials – the scheme now enshrined (as to hearsay evidence) in the Criminal Justice Act 2003 and (as to anonymous evidence) in the Criminal Evidence (Witness Anonymity) Act 2008 – cannot stand and many guilty defendants will have to go free. It is difficult to suppose that the Strasbourg Court has in fact laid down so absolute a principle as this and, indeed, one exception to it, at least, appears to be acknowledged: the fairness of admitting hearsay evidence from a witness absent as a result of the defendant's own intimidation. But if this is recognised (and, as others have pointed out, this exception itself involves difficulties of proof) why not recognise other exceptions too provided only and always that the procedures honour the ultimate imperative of a fair trial? That, after all, is the overarching principle for which the great bulk of Strasbourg jurisprudence on article 6 stands.

114. Given, moreover, the recognition of even one exception, what justification can there be for an otherwise absolute principle? It cannot then be said to be mandated simply by the language of article 6(3)(d). Nor, indeed, do I understand the Strasbourg Court ever to have suggested this.

115. Nor can Strasbourg readily be supposed to have intended the sort of practical problems and anomalies identified by the Court of Appeal (paragraphs 61-63 and 68-71) that must inevitably flow from any absolute principle of the kind here contended for. Obviously, the more crucial the evidence is to the proof of guilt, the more scrupulous must the Court be to ensure that it can be fairly adduced and is likely to be reliable. In this connection there can be no harm in using the concept of "sole or decisive" so long as it is used broadly – as it is in the 2008 Act with regard to anonymous witnesses and, indeed, in the control order context where it relates rather to the allegations made against the suspect than the evidence adduced in support. Understood and applied inflexibly, however, the concept would involve insoluble problems of detailed interpretation and application.

116. The better view may therefore be that no such absolute principle emerges from the Strasbourg Court's judgment in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1. In this event the stuffing falls out of these appeals and they must fail: the domestic legislation on hearsay evidence was faithfully followed in the courts below; there was nothing unfair about admitting the relevant statements and the convictions can be seen to be perfectly safe.

117. I recognise, however, the distinct possibility that the Strasbourg Court in *Al-Khawaja* really did intend to lay down an absolute principle along the lines here contended for and it may be, indeed, that the outcome of that very case itself tends to support such a view. In this event the question then arises: what should this Court do? Should we accept and apply this absolute principle with the inevitable result that these appeals must be allowed or should we instead decline to follow the Strasbourg decision in *Al-Khawaja* and in effect join with the United Kingdom Government in inviting the

Grand Chamber to overrule it (the Grand Chamber panel having adjourned the UK's request for such a reference until the pronouncement of our decision on these appeals)?

118. I have not the least doubt that the latter course is to be preferred. This case seems to me a very far cry from *Secretary of State for the Home Department v AF (No 3)* [2009] 3 WLR 74 where the House of Lords was faced with a definitive judgment of the Grand Chamber in *A v United Kingdom* (2009) 49 EHRR 625 on the very point at issue and where each member of the Committee felt no alternative but to apply it. Lord Rodger put it most succinctly (at para 98):

> "*Argentoratum locutum, iudicium finitum* – Strasbourg has spoken, the case is closed."

119. Moreover not merely was the Strasbourg ruling in *A* clear and authoritative but, whatever view individual members of the Committee may have taken about it (and it is evident that, whilst many agreed with it, others did not), it expressed an entirely coherent view.

120. The contrasts with the present situation are striking. In the first place, we are faced here not with a Grand Chamber decision but rather with the possible need for one. Moreover, not merely is the Court's ruling in *Al-Khawaja* not as authoritative as a Grand Chamber decision, but it is altogether less clear than was the decision in *A.* Indeed, as I have already suggested, it is far from certain that *Al-Khawaja* stands for any absolute principle of the sort here contended for. I would reject the appellant's argument that not merely is the Court's judgment in *Al-Khawaja* clear but, unlike the position in *A,* it is supported by a whole stream of consistent earlier Strasbourg case law and consequently more, rather than less, authoritative than the ruling in *A.* For the reasons fully elaborated by the Court of Appeal and now by Lord Phillips, I cannot accept that the earlier cases support, still less compel, an absolute principle such as *Al-Khawaja* is now said to stand for.

121. Accordingly, in agreement both with Lord Phillips and with the judgment of the Court of Appeal, I too would dismiss these appeals and express the hope that the Grand Chamber will clarify the law upon hearsay evidence and recognise that our domestic legislation is compatible with article 6.