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Supreme Court

# Regina *v* Horncastle and another

# Regina *v* Marquis and another

# Regina *v* Carter

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[2009] EWCA Crim 964

[2009] UKSC 14

2009 March 24; May 22 — Thomas, Hughes LJJ, Penry-Davey, Irwin, Wyn Williams JJ

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2009 July 7, 8, 9; Dec 9 — Lord Phillips of Worth Matravers PSC, Lord Judge CJ, Lord Neuberger of Abbotsbury MR, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Mance, Lord Kerr of Tonaghmore JJSC

*Crime — Evidence — Hearsay — Victims giving written statements but unavailable at trial — Statements admitted in evidence — Whether statements constituting*

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*sole or decisive evidence — Whether admission infringing defendants' Convention right to fair trial — Whether convictions safe — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6(1)(3)(d) — Criminal Justice Act 2003 (c 44), s 116*

The defendants in the first appeal were charged with causing grievous bodily harm with intent. The victim gave a witness statement to the police detailing the

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circumstances of the attack but died before trial for reasons unconnected with the incident. At trial the judge admitted the statement in evidence under section 116(1)(2)(a) of the Criminal Justice Act 2003[1] and, although it was not the sole evidence against the defendants, it was to a decisive extent the basis on which they were convicted. In the second appeal the defendants were charged with kidnap. The victim gave a statement to the police describing the incident but, through fears for her safety which were not induced by the defence, she absconded prior to the trial. The

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judge admitted her statement in evidence under section 116(1)(2)(e) of the 2003 Act. A considerable body of evidence was also given at the trial and the defendants were convicted. On appeal the defendants in both appeals submitted, in reliance on the "sole or decisive rule" applied by the European Court of Human Rights, that since their convictions were based solely or to a decisive extent on the statements of absent witnesses whom they had had, necessarily, no chance to cross-examine, their rights guaranteed by article 6(1)(3)(d) of the Convention for the Protection of Human

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Rights and Fundamental Freedoms[2] had been violated and their convictions were unsafe. The Court of Appeal, having concluded that the provisions of the 2003 Act produced a fair trial and that the jurisprudence of the European court required the

[1] Criminal Justice Act 2003, s 116: "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if— (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter, (b) the person who made the statement (the relevant person) is identified to the

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court's satisfaction, and (c) any of the five conditions mentioned in subsection (2) is satisfied. (2) The conditions are— (a) that the relevant person is dead; . . . (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

[2] Human Rights Act 1998, Sch 1, Pt I, art 6(1)(3): see post, Supreme Court judgments, para 5.

court neither to read down the provisions of the Act nor to exclude the statements in its discretion under section 78 of the Police and Criminal Evidence Act 1984[3], dismissed the appeals.

On the defendants' appeals—

*Held*, dismissing the appeals, that although the domestic court was required to take account of the jurisprudence of the European Court of Human Rights in applying principles which were clearly established, where, on rare occasions, the domestic court was concerned that the European court's decision insufficiently appreciated or accommodated particular aspects of the domestic process, it might decline to follow the decision; that the present cases came within that category; that the 2003 Act represented a crafted code enacted by Parliament which regulated the admission of hearsay evidence at trial in the interests of justice and contained specific safeguards which did not include a "sole or decisive" rule and rendered such a rule unnecessary; that the statutory code struck the correct balance between ensuring the fairness of the defendant's trial and protecting the interests of the victim in particular and society in general that a guilty person should not be immune from conviction where a witness who had given critical and apparently reliable evidence in a statement was unavailable through death or some other reason to be called at trial; that, although the European court had recognised the need for exceptions to the strict application of article 6(3)(d), since it had approved such exceptions largely in the context of continental procedures which did not address the aspect of a fair trial guaranteed by article 6(3)(d) its resulting jurisprudence lacked clarity; that the "sole and decisive" rule, which had been introduced into its jurisprudence without explanation of the underlying principle or full consideration of whether its imposition was justified as applicable equally to the continental and common law jurisdictions, would create severe practical difficulties if applied to English criminal procedure and the European court had not established that its introduction was necessary; that it was not right for the domestic court to require such a rule to be applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning; and that, so long as those provisions were observed, there would be no breach of article 6 and, in particular article 6(3)(d), if a conviction were based solely or to a decisive extent on hearsay evidence; and that, accordingly, there was no ground for differing from the Court of Appeal's conclusion that the defendants' appeals were unsustainable (post, Supreme Court judgments, paras 11, 13–14, 36, 38, 64–66, 73, 76–77, 80, 86, 91–92, 99–111, 112, 116–121).

*Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1 not applied.

Decision of the Court of Appeal (Criminal Division), post, p 379; [2009] EWCA Crim 964; [2010] 2 WLR 47; [2009] 4 All ER 183 affirmed.

The following cases are referred to in the judgments of the Supreme Court:

*A v United Kingdom* (2009) 49 EHRR 625, GC
*AM v Italy* Reports of Judgments and Decisions 1999-IX, p 45
*Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1
*Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, p 10
*Asch v Austria* (1991) 15 EHRR 597
*Bannon v The Queen* (1995) 185 CLR 1
*Birutis v Lithuania* (Applications Nos 47698/99 and 48115/99) (unreported) given 28 March 2002, ECtHR
*Bricmont v Belgium* (1989) 12 EHRR 217
*Crawford v Washington* (2004) 124 S Ct 1354; 541 US 36

[3] Police and Criminal Evidence Act 1984, s 78(1): see post, Supreme Court judgments, para 28.

A *Craxi v Italy* (Application No 34896/97) (unreported) given 5 December 2002, ECtHR
*Delta v France* (1990) 16 EHRR 574
*Doorson v The Netherlands* (1996) 22 EHRR 330
*Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288
*Ferrari-Bravo v Italy* (1984) 37 DR 15
*Grant v The Queen* [2006] UKPC 2; [2007] 1 AC 1; [2006] 2 WLR 835, PC
B *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597
*Kostovski v The Netherlands* (1989) 12 EHRR 434
*Krasniki v Czech Republic* (Application No 51277/99) (unreported) given 28 February 2006, ECtHR
*Lucà v Italy* (2001) 36 EHRR 807
*Lüdi v Switzerland* (1992) 15 EHRR 173
*Melendez-Diaz v Massachusetts* (unreported) 25 June 2009, US Sup Ct
C *Myers v Director of Public Prosecutions* [1965] AC 1001; [1964] 3 WLR 145; [1964] 2 All ER 881, HL(E)
*Ohio v Roberts* (1980) 100 S Ct 2531; 448 US 56
*PS v Germany* (2001) 36 EHRR 1139
*R v Al-Khawaja* [2005] EWCA Crim 2697; [2006] 1 WLR 1078; [2006] 1 All ER 543, CA
*R v Bain* [1996] 1 NZLR 129
D *R v Baker* [1989] 1 NZLR 738
*R v Davis* [2008] UKHL 36; [2008] AC 1128; [2008] 3 WLR 125; [2008] 3 All ER 461; [2008] 2 Cr App R 462, HL(E)
*R v Galbraith* [1981] 1 WLR 1039; [1981] 2 All ER 1060; 73 Cr App R 124, CA
*R v Hovell* [1987] 1 NZLR 610
*R v Khan* [1990] 2 SCR 531
E *R v Manase* [2001] 2 NZLR 197
*R v Mayers* [2008] EWCA Crim 2989; [2009] 1 WLR 1915; [2009] 2 All ER 145; [2009] 1 Cr App R 403, CA
*R v Rockey* [1996] 3 SCR 829
*R v Sellick* [2005] EWCA Crim 651; [2005] 1 WLR 3257; [2005] 2 Cr App R 211, CA
*R v Smith* [1992] 2 SCR 915
F *R v Tahery (Alireza)* [2006] EWCA Crim 529, CA
*R v Y* [2008] EWCA Crim 10; [2008] 1 WLR 1683; [2008] 2 All ER 484; [2008] 1 Cr App R 411, CA
*R (D) v Camberwell Green Youth Court* [2005] UKHL 4; [2005] 1 WLR 393; [2005] 1 All ER 999; [2005] 2 Cr App R 1, HL(E)
*Sadak v Turkey* (2001) 36 EHRR 431
G *Saïdi v France* (1993) 17 EHRR 251
*Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269; [2009] 3 WLR 74; [2009] 3 All ER 643, HL(E)
*Taxquet v Belgium* (Application No 926/05) (unreported) given 13 January 2009, ECtHR
*Trivedi v United Kingdom* (1997) 89-A DR 136
*Unterpertinger v Austria* (1986) 13 EHRR 175
H *Van Mechelen v The Netherlands* (1997) 25 EHRR 647
*Visser v The Netherlands* (Application No 26668/95) (unreported) given 14 February 2002, ECtHR
*Windisch v Austria* (1990) 13 EHRR 281
*X v Federal Republic of Germany* (1979) 17 DR 231
*X v United Kingdom* (1992) 15 EHRR CD 113

The following additional cases were cited in argument before the House of Lords:

*Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
*Coy v Iowa* (1988) 487 US 1012
*Edwards v United Kingdom* (1992) 15 EHRR 417
*Isgrò v Italy* 19 February 1991, Publications of the European Court of Human Rights, Series A no 194-A, p 12
*R v Acton Justices, Ex p McMullen* (1990) 92 Cr App R 98, DC
*R v Adams* [2007] EWCA Crim 3025; [2008] 4 All ER 574; [2008] 1 Cr App R 430, CA
*R v Arnold* [2004] EWCA Crim 1293; [2005] Crim LR 56, CA
*R v Cole* [2007] EWCA Crim 1924; [2007] 1 WLR 2716; [2008] 1 Cr App R 81, CA
*R v Davies* [2006] EWCA Crim 2643; [2007] 2 All ER 1070, CA
*R v Doherty* [2006] EWCA Crim 2716; 171 JP 79, CA
*R v Forbes* [2001] 1 AC 473; [2001] 2 WLR 1; [2001] 1 All ER 686; [2001] 1 Cr App R 430, HL(E)
*R v H* [2001] Crim LR 815; The Times, 6 July 2001, CA
*R v Littlechild (Andrew)* [2002] EWCA Crim 1784, CA
*R v M (KJ)* [2003] EWCA Crim 357; [2003] 2 Cr App R 322, CA
*R v Martin* [1996] Crim LR 589, CA
*R v Powar* [2009] EWCA Crim 594; [2009] 2 Cr App R 120, CA
*R v T (D)* [2009] EWCA Crim 1213; 173 JP 425, CA
*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
*R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
*SN v Sweden* (2002) 39 EHRR 304
*Saunders v United Kingdom* (1996) 23 EHRR 313
*Scott v The Queen* [1989] AC 1242; [1989] 2 WLR 924; [1989] 2 All ER 305; 89 Cr App R 153, PC
*Secretary of State for the Home Department v MB* [2007] UKHL 46; [2008] AC 440; [2007] 3 WLR 681; [2008] 1 All ER 657, HL(E)

The following cases are referred to in the judgment of the Court of Appeal:

*Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1
*Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, p 10
*Birutis v Lithuania* (Applications Nos 47698/99 and 48115/99) (unreported) given 28 March 2002, ECtHR
*Brown v Stott* [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
*Delta v France* (1990) 16 EHRR 574
*Doorson v The Netherlands* (1996) 22 EHRR 330
*Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288
*Grant v The Queen* [2006] UKPC 2; [2007] 1 AC 1; [2006] 2 WLR 835, PC
*Khan v United Kingdom* (2000) 31 EHRR 1016
*Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597
*Kostovski v The Netherlands* (1989) 12 EHRR 434
*Krasniki v Czech Republic* (Application No 51277/99) (unreported) given 28 February 2006, ECtHR
*Lucà v Italy* (2001) 36 EHRR 807
*Lüdi v Switzerland* (1992) 15 EHRR 173
*R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1; [2001] 2 Cr App R 351, HL(E)

A *R v Andrews (Donald)* [1987] AC 281; [1987] 2 WLR 413; [1987] 1 All ER 513; 84 Cr App R 382, HL(E)
*R v Davis* [2008] UKHL 36; [2008] AC 1128; [2008] 3 WLR 125; [2008] 3 All ER 461; [2008] 2 Cr App R 462, HL(E)
*R v Galbraith* [1981] 1 WLR 1039; [1981] 2 All ER 1060; 73 Cr App R 124, CA
*R v Mayers* [2008] EWCA Crim 2989; [2009] 1 WLR 1915; [2009] 2 All ER 145; [2009] 1 Cr App R 403, CA
B *R v Pendleton* [2001] UKHL 66; [2002] 1 WLR 72; [2002] 1 All ER 524; [2002] 1 Cr App R 441, HL(E)
*R v Y* [2008] EWCA Crim 10; [2008] 1 WLR 1683; [2008] 2 All ER 484; [2008] 1 Cr App R 411, CA
*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
C *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
*SN v Sweden* (2002) 39 EHRR 304
*Saïdi v France* (1993) 17 EHRR 251
*Saunders v United Kingdom* (1996) 23 EHRR 313
*Trivedi v United Kingdom* (1997) 89-A DR 136; [1997] EHRLR 521
*Unterpertinger v Austria* (1986) 13 EHRR 175
D *Van Mechelen v The Netherlands* (1997) 25 EHRR 647
*Visser v The Netherlands* (Application No 26668/95) (unreported) given 14 February 2002, ECtHR
*Windisch v Austria* (1990) 13 EHRR 281

The following additional cases were cited in argument before the Court of Appeal:

E *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)
*R v Adams* [2007] EWCA Crim 3025; [2008] 4 All ER 574; [2008] 1 Cr App R 430, CA
*R v Arnold* [2004] EWCA Crim 1293; [2005] Crim LR 56, CA
*R v Cole* [2007] EWCA Crim 1924; [2007] 1 WLR 2716; [2008] 1 Cr App R 81, CA
*R v H* [2003] EWCA Crim 2847; [2003] 1 WLR 3006; [2004] 1 Cr App R 182, CA; [2004] UKHL 3; [2004] 2 AC 134; [2004] 2 WLR 335; [2004] 1 All ER 1269;
F [2004] 2 Cr App R 179, HL(E)
*R v Sellick* [2005] EWCA Crim 651; [2005] 1 WLR 3257; [2005] 2 Cr App R 211, CA

The following additional cases, although not cited, were referred to in the skeleton arguments before the Court of Appeal:

G *Isgrò v Italy* 19 February 1991, Publications of the European Court of Human Rights, Series A no 194-A, p 12
*PS v Germany* (2001) 36 EHRR 1139
*R v Al-Khawaja* [2005] EWCA Crim 2697; [2006] 1 WLR 1078; [2006] 1 All ER 543; [2006] 1 Cr App R 184, CA
*R v Greenwood* [2004] EWCA Crim 1388; [2005] 1 Cr App R 99, CA
*R v McLean* [2007] EWCA Crim 219; [2008] 1 Cr App R 155, CA
H *R v Nelson* [2006] EWCA Crim 3412; [2007] Crim LR 709, CA
*R v Simpson* [2003] EWCA Crim 1499; [2004] QB 118; [2003] 3 WLR 337; [2003] 3 All ER 531; [2003] 2 Cr App R 545, CA
*R v Tahery (Alireza)* [2006] EWCA Crim 529, CA
*Subramaniam v Public Prosecutor* [1956] 1 WLR 965, PC
*X v United Kingdom* (1992) 15 EHRR CD 113

*R v Horncastle and another*

**APPEALS** against conviction and **APPLICATIONS** for leave to appeal against sentence

On 29 November 2007 in the Crown Court at Liverpool, before Judge Phipps and a jury, the defendants, Christopher Horncastle and David Lee Blackmore, were convicted of causing grievous bodily harm with intent, contrary to section 18 of the Offences against the Person Act 1861. On 30 November 2007 Horncastle was sentenced to imprisonment for public protection with a specified minimum term of six years and Blackmore was sentenced to 12 years' imprisonment. They each (i) appealed against conviction on the grounds that the judge had wrongly allowed the admission into evidence of the written statement of the complainant who had died before the trial; and (ii) sought leave to appeal against sentence.

The facts are stated in the judgment of the court.

*R v Marquis and another*

**APPEALS** against conviction

On 12 May 2008 in the Crown Court at Nottingham, before Judge Bennett, the defendant, Joseph David Graham, pleaded guilty to dangerous driving and assault with intent to resist arrest. On 20 May 2008 in the Crown Court at Nottingham, before Judge Bennett and a jury, both he and the defendant, Abijah Marquis, were convicted of kidnap. On 24 July 2008 Marquis was sentenced to imprisonment for public protection with a specified minimum term of ten years and Graham was sentenced to imprisonment for public protection with a specified minimum term of five years. They each appealed against conviction on the grounds that their convictions were based to a decisive extent on hearsay statements, in contravention of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The facts are stated in the judgment of the court.

*R v Carter*

**APPEAL** against conviction

On 22 October 2008 in the Crown Court at Reading, before Judge McIntyre and a jury, the defendant, David Michael Carter, was convicted of ten counts of distributing indecent photographs of children, contrary to section 1(1)(b) of the Protection of Children Act 1978. On 28 November 2008 he was sentenced to concurrent terms of 18 months' imprisonment on each count. He appealed against conviction on the grounds that the judge had wrongly allowed the admission in evidence of a hearsay document where there was no evidence as to its reliability.

The facts are stated in the judgment of the court.

*John A Gibson*, assigned by the Registrar of Criminal Appeals, for the first defendant in the first appeal.

*Janet Reaney*, assigned by the Registrar of Criminal Appeals, for the second defendant in the first appeal.

*James Beck*, solicitor, assigned by the Registrar of Criminal Appeals, for the first defendant in the second appeal.

A *Shaun Smith QC*, assigned by the Registrar of Criminal Appeals, for the second defendant in the second appeal.

*Keith Hadrill*, assigned by the Registrar of Criminal Appeals, for the defendant in the third appeal.

*Duncan Penny* and *Louis Mably* (instructed by *Crown Prosecution Service, Headquarters*) for the Crown.

B *Trevor Parry-Jones* (instructed by *Crown Prosecution Service, Liverpool*) for the Crown in the first appeal.

*Stephen Lowne* (instructed by *Crown Prosecution Service, Nottingham*) for the Crown in the second appeal.

*Barnaby Evans* (instructed by *Crown Prosecution Service, Reading*) for the Crown in the third appeal.

C The court took time for consideration.

22 May 2009. **THOMAS LJ** handed down the following judgment of the court.

*Introduction*

D **1** This is the judgment of the court to which we have all contributed.

**2** These three cases have in common the proper approach to evidence which is not given first hand by a witness—hearsay evidence. In the first (Horncastle and Blackmore), the witness was dead, but had made a full written statement before he died. In the second (Marquis and Graham), the witness, who again had made detailed statements, refused to attend because she was frightened for her safety, indeed for her life, if she did. E In the third (Carter), what was sought to be introduced as evidence was the product of business records in a large public company. Those are only some of the commonly occurring instances where the law must decide how to deal with evidence not given first hand by a witness. In each of the cases, the admission and use of the evidence was governed by the provisions of sections 114 to 136 of the Criminal Justice Act 2003 F ("CJA 2003") which enacted a code recommended by the Law Commission in their 1997 Report *Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com No 245).

**3** On 20 January 2009, the European Court of Human Rights ("ECtHR"), sitting as a Chamber, handed down its decision in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1. In *Al-Khawaja* the G statement of evidence of a deceased witness was admitted under section 23 of the Criminal Justice Act 1988 and in *Tahery* the statement of evidence of a witness too fearful to attend trial was admitted under section 116 of the CJA 2003. In each case this court held that the statements were admissible and that the convictions were safe. It was common ground before the ECtHR that the court should consider each conviction as being based on the evidence of the deceased or frightened witness solely or to a H decisive degree. The court held that there had been a breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") in each case, as the conviction had been based to a sole or decisive degree on the statements which the appellants had had no opportunity of challenging. On 16 April 2009, the

United Kingdom government requested that the decision be referred to the Grand Chamber.

**4** The principal argument raised in these appeals is that, in consequence of that decision, the admission of hearsay evidence meant that the convictions involved an infringement of the right to a fair trial under article 6, and in particular a breach of article 6(3)(d), as the convictions were based solely or to a decisive degree on the hearsay admitted as evidence. In consequence, it is said, the convictions are unsafe and ought to be quashed.

**5** It is necessary first to set out the scheme of the CJA 2003 under which the statements were admitted in two of the appeals and about which there was argument in the third.

*Hearsay: the scheme of the CJA 2003*

*(i) The evolution of the hearsay rule*

**6** Systems of criminal law evolve rules for dealing with evidence which is not given orally by someone speaking from personal knowledge. The solutions adopted vary for a number of reasons, not least because of different concepts of the trial process. The process for the determination of allegations of criminal offences in England and Wales has over the centuries evolved to depend upon a single trial at which the whole of the evidence (on either side) is ventilated and tested before independent, usually lay, finders of fact—a jury for serious cases and magistrates for the less serious ones.

**7** The law in England and Wales has in consequence always insisted that it is ordinarily essential that evidence of the truth of a matter be given in person by a witness who speaks from his own observation or knowledge. It uses the legal expression "hearsay" to describe evidence which is not so given, but rather is given second hand, whether related by a person to whom the absent witness has spoken, contained in a written statement of the absent witness, given in the form of a document or record created by him, or otherwise.

**8** The obvious potential weakness of hearsay evidence is that the fact finder never sees the person who gives the evidence which he must evaluate, and the parties cannot ask supplementary or testing questions which are likely to help judge the truthfulness and accuracy of the evidence, when those attributes are in doubt. Conversely, if the person cannot be brought to court, an exclusionary rule will deprive the fact finder of evidence which may well help him to arrive at the correct answer in the case, and in many instances will eliminate evidence of whose truthfulness and/or accuracy there is little room for real doubt.

**9** The default rule of the criminal law of England and Wales has always been that hearsay is inadmissible. Unmodified, however, such a blanket rule created many examples of injustice so that it was always subject to many exceptions, some recognised by the courts as developments of the common law, and others created by statute. In consequence the law of hearsay in England and Wales became complex and not always internally consistent. At times it was found to risk adjectival procedural rules triumphing over substantive justice, whether to the injury of a defendant, of a victim or other

witness, or of the public. It was subjected over many years to intensive analysis and discussion.

*(ii) The report of the Law Commission*

10 The Royal Commission on Criminal Justice recommended in 1993 that reform must be considered. That task was entrusted to the Law Commission which reported in 1997 after several years of wide consultation with judges, practitioners, academic lawyers and other experts based on its Consultation Paper published in 1995. Its report (Law Com No 245—*Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997)) ran to 256 pages. It carefully considered the implications of the Convention, though at that time it did not have the force of law under domestic legislation. With limited modifications, its detailed recommendations were adopted by Parliament which passed a new comprehensive statutory code relating to all issues of hearsay in criminal proceedings in the form of Part 11, Chapter 2 of the CJA 2003. This code was thus 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.

*(iii) The scheme of the statutory code*

11 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 (sections 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, (sections 114(1)(a)(c), 116 to 117, 119 to 120 and 127 to 129); (iii) it provides for a limited residual power to admit hearsay if the interests of justice require it (section 114(1)(d) and (2)); (iv) it establishes special stipulations to which hearsay evidence is subject (sections 121 to 126).

12 Among the provisions of Part 11, Chapter 2 of the CJA 2003 in the second group are the following: (i) by section 116(1)(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 United Kingdom, or cannot despite all practicable efforts be found; (ii) by section 116(1)(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 section 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.

13 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 (section 116(1)(a)); and (ii) the witness must be identified to the satisfaction of the court (section 116(1)(b)).

**14** 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.

**15** 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 section 117 or, where a machine is involved, section 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 (section 117(2)), and the court is not to admit them if there is doubt about their reliability: sections 117(6)(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 (section 117(5)): that is designed to ensure that if he can attend to give first-hand evidence he does so. Section 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. Section 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.

**16** 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) Section 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

A 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 B 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 section 125 the judge is C 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) Section 126 preserves the general power of the judge (which existed at D common law and is enshrined in section 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.

E

*(iv) The rejection of the requirement that essential evidence had to be supported*

17 The Law Commission had provisionally canvassed the possibility that hearsay should be subject to a general rule that it could not be capable of proving an essential element of an offence unless supported by other F (direct) evidence. It concluded as a result of the lengthy consultation process that such a rule would be wrong. Its conclusion was that such a provision would reintroduce into the law of England and Wales the highly technical and unsatisfactory features of the rules of corroboration, only recently repealed, and would lead to convictions being impossible even when the hearsay evidence of a single element of the offence was to all intents and G purposes indisputable. The safeguards which are contained in sections 124 to 126 (above) were, the commission concluded, the principled route to ensuring that the trial of any accused remains fair, whilst enabling the jury to assess the weight of hearsay, as it must the weight of all other evidence. The Law Commission concluded, at para 5.40:

> "We are satisfied that such safeguards, and in particular the duty on the H court to acquit or direct an acquittal if the case depended wholly or substantially on unconvincing hearsay evidence such that a conviction would be unsafe, would provide adequate protection for the accused."

That conclusion was plainly shared by Parliament; the specific safeguard was enacted in section 125 to which we have referred at para 16(ii) above.

*Article 6 of the Convention*

**18** Articles 6(1) and 6(3)(d) of the Convention 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 . . . (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."

*(i) The provisions of the Human Rights Act 1998*

**19** These provisions of the Convention are among those which, like most of the remainder of it, have been given specific effect in the law of the United Kingdom by means of the Human Rights Act 1998. By section 6 it is unlawful for a public authority, which includes a court, to act in a manner incompatible with the rights specifically set out in Schedule 1 to the 1998 Act. The only exception is when primary legislation makes it impossible for a court to act otherwise. That is extremely rare, partly because Parliament takes steps to ensure, before legislating, that its statutes will not infringe Convention rights and also because by section 3 of the 1998 Act, a statute is to be read, wherever possible, in a manner compatible with such rights. An example of the noticeably positive manner in which this obligation is regarded is *R v A (No 2)* [2002] 1 AC 45.

**20** It follows that under the law of the United Kingdom, the courts must adjudicate where necessary upon the effect and meaning of any Convention right. In doing so, a court must by section 2(1) of the Human Rights Act 1998 "take into account any . . . judgment, decision, declaration or advisory opinion of the European Court of Human Rights". The obligation under that statute to take such a judgment into account means that this court is not bound by a judgment of the ECtHR as a matter of precedent and must accept the responsibility of deciding the effect of Convention rights when the question arises. A United Kingdom court ought clearly to be heavily influenced by judgments of the ECtHR, in the interests of achieving so far as possible consistent interpretation of the Convention throughout the signatory nations. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, the House of Lords was concerned with whether the Secretary of State's powers to "call in" planning applications for his own decision infringed article 6. The House held that the rules for affording interested parties a hearing together with supervision, via judicial review, by an independent court sufficed to comply with that Article. In arriving at that conclusion, Lord Slynn of Hadley said, at para 26:

> "Your Lordships have been referred to many decisions of the European Court of Human Rights on article 6 of the Convention. Although the 1998 Act does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights."

A Similar remarks appear in a number of other cases—see for example Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20, in the context of the possible engagement of articles other than article 3 in "foreign" immigration cases. We are bound to follow these statements of approach.

**21** It may, however, sometimes happen that some divergence of view as to the application of the Convention is unavoidable. In *Brown v Stott* [2003] B 1 AC 681, the House of Lords was concerned with the principle against self-incrimination in the context of a requirement laid upon the keeper of a motor vehicle to identify the driver at the time of an alleged traffic offence. Both Lord Steyn, at p 711, and Lord Hope of Craighead, at p 720, were constrained to express the view that the decision of the ECtHR in *Saunders v United Kingdom* (1996) 23 EHRR 313, presented a number of difficulties C upon the crucial question of whether the right against self-incrimination was absolute.

**22** In addressing the question of compatibility with the Convention, it is important to note that here, unlike in other cases such as *Alconbury*, the relevant statutory provisions enacted by Parliament are a statutory code which represented a considered Parliamentary resolution of the proper D balance to be achieved between competing interests in the light of Convention rights.

*(ii) The contentions of the appellants as to the application of the Convention*

**23** If the consequence of article 6(3)(d) is that the admission of sole or decisive hearsay evidence is an infringement of the Convention rights of a E defendant (irrespective of whether that witness cannot be brought to court, and irrespective of whether the evidence is seriously open to doubt or not) then counsel for the appellants submitted that the court could ensure compatibility with the Convention by one of two methods: (i) the court might decline to admit hearsay evidence in every such case through the exercise of its discretion in each case to do so. The court would have to rely F on its powers under section 78 of the Police and Criminal Evidence Act 1984, and would have to hold that the admission of such evidence would have such an adverse effect on the fairness of the trial that it ought not to be permitted, despite the plain Parliamentary enactment of the rule that such evidence "is admissible"; (ii) section 116 of the CJA 2003 would have to be construed as if it contained, at its end, a proviso containing words such as the following: "but such evidence shall not be admissible if the conviction of G the accused would be founded upon it as the sole or decisive evidence."

**24** Both methods would involve this court in substantially rewriting the code enacted by Parliament in the CJA 2003, by introducing a qualification to the admissibility of the evidence which Parliament self-evidently considered but rejected.

**25** Before considering whether it is necessary for us to do so, we must H consider what article 6(3)(d) requires.

*(iii) The issue*

**26** In the present appeals the critical question is to what extent the specific rights set out in article 6(3), and specifically that in article 6(3)(d),

are absolute, or can be qualified provided the overriding principle that a criminal trial must be fair to the accused and his rights respected is observed—a principle which the law of England and Wales has long recognised in the context of an adversarial and oral procedure and for which it has evolved detailed rules of evidence and procedure to that end.

**27** Article 6 requires that the trial shall be fair. Article 6(3)(d) is not simply an example of a right to a fair trial but has a content of its own. The interests of others, victims, witnesses and the public amongst them, must also be recognised, though they cannot detract from the requirement of the overall fairness of the trial: see para 37 below. This follows also from the Convention, for the article 2, 3 and 8 rights of victims and witnesses are, as those articles are nowadays understood, undoubtedly engaged in decisions upon the trial process. A simple example is that of the witness who would be likely to expose himself to death or serious violence, at the hands of whomsoever, if he were to give evidence.

**28** The question with which we are confronted is whether article 6 requires the line as to the admissibility of hearsay (against a defendant) to be drawn at the point at which such evidence is to be classified as the "sole or decisive" evidence or whether the Convention permits it to be drawn in the manner enacted by Parliament in the CJA 2003.

**29** We will first consider the case law of the ECtHR to see the extent to which it supports the appellants' contention that hearsay evidence cannot be relied on where a conviction depends on such evidence to a sole or decisive degree.

*(iv) The case law of the ECtHR prior to the decision in Al-Khawaja and Tahery v United Kingdom (2009) 49 EHRR 1*

**30** In the oral argument before us, there was little discussion of the ECtHR case law. We requested written submissions in relation to the case law and in particular to cases where article 6(3)(d) had been considered prior to the decision in *Al-Khawaja*. We are grateful for those submissions.

**31** The cases fall into two broad categories—those where the witness was anonymous and those where he was identified but absent and not available for cross-examination by or on behalf of the defendant. In some cases the witness was both absent and anonymous. The considerations applying to the two categories are not identical (see paras 48–51 below), but a number of propositions can be derived from the cases irrespective of which category is concerned.

**32** The undoubted starting point of all the cases is that the admissibility of evidence is a matter for the national court. The primary role of the ECtHR is to determine whether, overall, the trial was fair. Statements to that effect are to be found in virtually all the cases where article 6(3)(d) has been considered.

**33** The second general proposition is that the ordinary rule must be that witnesses are examined in court—often described as the right of confrontation. As we have said, the law of England and Wales has always recognised that as a vital principle; it is the reason for the rule that hearsay is inadmissible unless there is specific provision for it.

**34** An early statement of these first two proposition can be found in *Kostovski v The Netherlands* (1989) 12 EHRR 434, para 39:

A "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, B were fair."

The same words are oft repeated subsequently.

35 The third general proposition is that, however sources of evidence may be classified in national law, the court considers the expression "witness" to have an autonomous meaning for the purposes of article 6. The expression will include persons who have given information to the police if C this information is relied upon in the trial process: see, amongst many other cases, *Kostovski v The Netherlands*, at para 40 and *Windisch v Austria* (1990) 13 EHRR 281, para 23. As appears from what we have said, the law of England and Wales conforms to this principle. Indeed, the law of England and Wales also classifies as hearsay evidence requiring special justification for admissibility material which may not be so classified by the ECtHR, such D as business or other records and spontaneous utterances: *R v Andrews* [1987] AC 281, 295B and 300H.

36 Fourth, the cases recognise that there may be circumstances justifying a departure from the second proposition. There is thus no absolute or unqualified right to the confrontation of every witness. A classic statement of this fourth proposition follows closely after the passage cited above in *Kostovski v The Netherlands*, at para 41:

E "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 that the F rights of the defence have been respected."

"Statements obtained at the pre-trial stage" may be obtained either by the police or, where the national system provides for such a person, by an investigating judge. The early case of *Unterpertinger v Austria* (1986) 13 EHRR 175 was concerned with statements made only to police officers which were read out at the trial. The court said of them, at para 31:

G "In itself, the reading out of statements in this way cannot be regarded as being inconsistent with article 6(1) and (3)(d) of the Convention, but the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of article 6 to protect."

H *Kostovski v The Netherlands* 12 EHRR 434 itself contained examples of both forms of statement; both witnesses made statements to the police, and one of them was also examined by an investigating judge, although not by or on behalf of the defendant. The cases generally appear to make no distinction between a statement to the police and one to an investigating judge.

37 Fifth, in departing from the right to confrontation described in the second proposition, the Convention rights of witnesses under articles 2, 3 and 8 are engaged and material. The court has repeatedly said that contracting states "should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled": *Doorson v The Netherlands* (1996) 22 EHRR 330, para 70, and other cases. Examples of reasons which have been found in principle acceptable to the court are: (i) death: *Ferrantelli and Santangelo v Italy* (1997) 23 EHRR 288; (ii) illness: *Trivedi v United Kingdom* (1997) 89-A DR 136; (iii) fear of reprisals, whether from the defendant personally or more generally: *Doorson*, at para 71; *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597; *Visser v The Netherlands* (Application No 26668/95) (unreported) given 14 February 2002, para 47; *Krasniki v Czech Republic* (Application No 51277/99) (unreported) given 28 February 2006, paras 80–81; (iv) missing witness: *Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, p 10; (v) vulnerable witness such as a child: *SN v Sweden* (2002) 39 EHRR 304. It will be seen that these categories, which are not exhaustive, are closely matched in the CJA 2003.

38 Sixth, where such a course is under consideration it must not be adopted without careful thought and analysis of (a) the circumstances in which the statements which are to be relied upon were made and (b) the reasons for the witness not being called and made available for examination. The departure from the right must then be justified. In a number of the cases an infringement of article 6(1) with (3)(d) was found substantially on the basis that such examination had not been undertaken, let alone departure justified. *Van Mechelen v The Netherlands* (1996) 25 EHRR 647 was such a case. The witnesses were police officers, not operating undercover but normally. There was no proper consideration of why they should be anonymous, and no reason why they should be. The court held, at para 60, that there had been no explanation of why anonymity was thought necessary or why less far reaching measures had not been considered. *Visser v The Netherlands* was a further example: the reputation of the co-accused was capable of being a justification for non-confrontation, but there was no indication how the judge had evaluated the risk to the witness or the sufficiency of reasons for anonymity, especially given that the events spoken of were six years previously: see para 47. *Krasniki v Czech Republic* is similar: see para 81. In *Birutis v Lithuania* (Applications Nos 47698/99 and 48115/99) (unreported) given 28 March 2002 the court had also proceeded in reliance on the statements of large numbers of anonymous witnesses who were not questioned by anyone at court. The court said, at para 34:

> "Nor did the courts avail themselves of the statutory opportunity (articles 156-1 and 317-1 of the Code of Criminal Procedure) to examine, of their own motion, the manner and circumstances in which the anonymous statements had been obtained . . . The court's failure to question anonymous witnesses and to conduct a scrutiny of the manner and circumstances in which the anonymous statements had been obtained was unacceptable from the point of view of the first and second applicants' defence rights and their right to a fair trial under article 6(1) and (3)(d) of the Convention."

A **39** Seventh, where evidence is relied upon which is not given orally by the witness who is available to be examined by the defendant, the rights of the defence must be respected: see the proposition in *Kostovski v The Netherlands* 12 EHRR 434, at para 41, which we have cited, at para 36, above. This seventh proposition is frequently expressed in the cases as the requirement for counterbalancing measures sufficient to compensate for the restrictions placed upon the defence.

B **40** In some cases such counterbalancing measures have been found in the process in which a witness is examined not by or on behalf of the defendant but by an investigating judge at an earlier stage, as article 6(3)(d) implicitly recognises: see for example *Doorson v The Netherlands* 22 EHRR 330. But the cases also show that at least where the evidence in question is only a part of the evidence relied upon for the conviction, there C need be no counterbalancing measures. There were none in *Ferrantelli and Santangelo v Italy* 23 EHRR 288, where the evidence in question was what had been said by an accomplice who implicated the defendant but died before there was any examination of him by anyone other than the police. There was no breach of article 6 having regard to the other evidence, albeit much less significant than that of the accomplice, namely evidence of the defendant's involvement in the purchase of some gas cylinders later used in D the offence, together with cross allegations made amongst the co-defendants and an absence of alibi (see para 53). Nor were there any counterbalancing measures in *Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, p 10 where in a case of alleged loan fraud the complainant was missing but his statement was admitted. It was principally the other evidence, in this case similar fact evidence and E the documents, together with the fact that the defendant had contributed to the absence of confrontation, that prevented any breach of article 6 (see para 17).

**41** However, what is important for the present cases is a further proposition adopted in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1 that if the evidence is the sole or decisive evidence there will necessarily be a breach of article 6 and article 6(3)(d) if the defendant is F denied the right to confront the witness, at least unless the case is one of fear. It is instructive to see how it has come about that this further proposition relating to sole or decisive nature of the evidence has come to be articulated in the cases.

**42** In the cases prior to *Al-Khawaja*, where complaint was made that a witness or witnesses had been absent or anonymous the court naturally G looked to see whether there was other evidence also before the trial court. That was clearly because the court was, consistently with the first proposition above, primarily looking at the overall fairness of the trial. If there was no other evidence that was clearly a factor in the decision that the trial was not fair. It does not, however, follow that in the cases where a breach was held to exist, there were not other grounds for saying that the trial was unfair, irrespective of the fact that the evidence was "sole or H decisive". (i) In *Unterpertinger v Austria* 13 EHRR 175 the allegation was of domestic violence. The complainant wife and her daughter declined to give evidence, relying on a rule equivalent to spousal exemption, and their statements were used instead of oral evidence. But the national courts had refused to allow the defendant to call evidence going to the credibility of the

absent witnesses. It is scarcely surprising that the trial process was held to be unfair. (ii) In a great many of the cases the witness was anonymous, and sometimes also absent, and it was held that there was simply no proper opportunity to test the evidence. In *Kostovski* the court was concerned with assertions emanating from witnesses who were not simply absent but also anonymous. They were police informants. Their identity was not even known to the court, let alone to the defendant, and except that one had been heard in private by an examining magistrate neither was asked any questions by anyone other than the police. It followed that there was also no scope for any material bearing on the credibility of the witnesses to be considered. (iii) In *Windisch v Austria* 13 EHRR 281 the witnesses were strangers who said that they could identify the defendant as being near the scene of a burglary. They were anonymous for reasons of fear, but their identity was not known to anyone but the police and they were not questioned by anyone else. Thus they were anonymous and absent, there was no investigation of their credibility whatsoever and there was in effect no way their reliability could be explored.

**43** In other cases there were other reasons for the finding of a breach of article 6: (i) in *Delta v France* (1990) 16 EHRR 574 the complainant in a street robbery case, and her supporting friend, had simply failed to come to court, with no explanation. There was no reason for the admission of their statements; (ii) in *Lüdi v Switzerland* (1992) 15 EHRR 173, the evidence was that of an undercover officer and the defence was entrapment. True it was that the case depended entirely on the officer, but there was no attempt to have him present, even if anonymous, for examination by the defendant, and moreover the defendant was unable to challenge the transcript. This was a case in which other measures to preserve the officer's anonymity could have been taken without keeping him altogether away from the trial, and if such measures had been taken it might be thought that the trial could be fair and the rights of the defence respected notwithstanding anonymity; (iii) *Saïdi v France* (1993) 17 EHRR 251 was a case of absent witnesses, two of whom were absconding co-accused, and although the names of the others were known there appears to have been no attempt to provide any information about them such as would enable their credibility to be checked. It appears that only one of six or so was ever questioned by anyone other than the police, and none by or on behalf of the defendant. All were drug users who might be thought to belong to a category of the potentially very unreliable.

**44** Thus in all these cases prior to *Doorson v The Netherlands* 22 EHRR 330 there was ample ground for holding the trial unfair or the that rights of the defence had not been respected. References to the absence of other evidence simply demonstrated that the evidence from a witness whom the defendant did not have an opportunity of questioning mattered significantly. It did not necessarily mean that such evidence which was critical to the trial could not fairly be relied upon if either it was demonstrably reliable or there were proper means of assessing its reliability and thereby providing counterbalancing measures that properly respected the rights of the defence.

**45** It appears to be in *Doorson v The Netherlands* that the expression "sole or decisive" was first employed. This was another case of anonymous witnesses but they were questioned by an investigating judge on the

A direction of the appeal court, and the defence advocate had the opportunity to examine the witnesses. That was held to be a sufficient counterbalancing measure. There was also other evidence against the defendant. His claim of breach of article 6 failed. The court included in its judgment, at para 76, this passage:

> "Finally, it should be recalled that, even when 'counterbalancing' B 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. That, however, is not the case here: it is sufficiently clear that the national court did not base its finding of guilt solely or to a decisive extent on the evidence of Y15 and Y16."

C This observation was not, however, necessary to the decision. No question arose in that case as to the position where there is evidence from identified witnesses forming the sole or a decisive part of the case for the prosecution, and such evidence is demonstrably reliable or its reliability can be assessed and tested, thereby properly respecting defence rights.

**46** The formulation in *Doorson v The Netherlands* was, however, repeated subsequently in other cases: (i) in *Van Mechelen v The Netherlands* D 25 EHRR 647, though in that case there was no justification for operational and non-undercover police officers to be accorded anonymity; (ii) in *Lucà v Italy* (2001) 36 EHRR 807, though in that case the evidence in question was that of a co-accused who was silent for the good reason that he relied on the equivalent to his privilege against self-incrimination. A co-accused with a plain interest in diverting blame from himself to another is a witness carrying E a particular risk of unreliability. It is not difficult to see why evidence of this kind ought to be heard in person and comprehensively tested, or not heard at all; (iii) in *Visser v The Netherlands* and in *Krasniki v Czech Republic*, though in both cases the witnesses were anonymous, there was no provision of material which enabled credibility to be tested and the only questioning allowed to the defendant was through a sound-only link which meant that the defence lawyer could not see the witness; (iv) in *Birutis v Lithuania*, but F in that case, as we have already said, at para 38 above, there was no proper evaluation of the reliability of the statements of a large number of anonymous witnesses.

**47** It follows that we respectfully question whether any of the decisions prior to *Al-Khawaja* has gone so far as to examine evidence from an identified witness who is absent for good reason, but where such evidence G can be assessed as reliable or tested in a manner that respects the rights of the defence.

*(v) The "sole or decisive" test in anonymous witness cases*

**48** It is necessary, we think, to distinguish between cases of anonymous witnesses and identified but absent witnesses. The CJA 2003 is concerned with identified but absent witnesses. It does not permit the admission H of the evidence of anonymous witnesses. Different considerations apply to anonymous witnesses.

**49** The origin of the expression "sole or decisive" in *Doorson v The Netherlands* 22 EHRR 330 was in the context of anonymous witnesses. Many if not most of the subsequent cases in which the expression has

appeared have been similarly concerned with anonymity. Even here, as Lord Mance pointed out in *R v Davis* [2008] AC 1128, paras 88 and 89 the case law of the ECtHR may not preclude circumstances in which even decisive testimony can be given anonymously. A

50 Whatever may be the position in relation to anonymous witnesses, in the balancing exercise necessary to see whether the trial as a whole is fair and defence rights have been respected, the considerations relating to anonymous witnesses are different from those arising where the witness is identified but absent for a specified reason. The issue of anonymity was considered by the House of Lords in *R v Davis*. The House concluded that the common law had long recognised the principle that the accused had the right to know the identity of his accusers. It was for Parliament to legislate in respect of the admission of such evidence in a manner compliant with the Convention (see in particular paras 45 and 98). The position of anonymous witnesses is now governed by the Criminal Evidence (Witness Anonymity) Act 2008, which sets out the specific conditions which must be met and the considerations a court must take into account. They are designed to protect the rights of the defendant. But we heard no argument on that Act and are not concerned with it. We are concerned with the position of identified but absent witnesses where the position is governed by the CJA 2003 and the considerations are different, as was accepted in *R v Davis*: see para 20 of the opinion of Lord Bingham of Cornhill. B C D

51 It is also important to note that in Recommendation No R (97) 13 (1997) of the Committee of Ministers of the Council of Europe (to which Lord Mance referred in *R v Davis*, at para 79) it is only in the case of anonymous witnesses that the recommendation was made that a conviction should not to a sole or decisive extent be based on such evidence (see para 13). The provisions of the CJA 2003 do not, as we have stated, permit evidence from unidentified or anonymous witnesses to be adduced. E

*(vi) The decision in Al-Khawaja on the application of the sole or decisive test to absent but identified witnesses*

52 In *Al-Khawaja* the ECtHR relied upon the following passage, at para 40 of the judgment in *Lucà v Italy* 36 EHRR 807, in which the expression "sole or decisive" had been repeated: F

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

A extent that is incompatible with the guarantees provided by article 6 (see the judgment of *Unterpertinger v Austria* 13 EHRR 175, paras 31–33; *Saïdi v France* 17 EHRR 251, paras 43–44; and of *Van Mechelen* 25 EHRR 647, p 712, para 55; see also *Dorigo v Italy* (Application No 33286/96), European Commission of Human Rights Report of 9 September 1998, unpublished, para 43 and, on the same case, B Committee of Ministers Resolution HR (99) 258 of 15 April 1999)."

**53** In our respectful view, there is, on analysis, no reason from the case law of the ECtHR, as we have set out, to treat the cases dealing with absent and anonymous witnesses as the same, as this passage appears to do. We also consider that the observations of the court in *Lucà v Italy* went further than the facts that that or previous cases required, for the reasons we have C given in para 46(ii) above.

**54** In reaching its conclusion that the sole or decisive test applied to an absent witness, the ECtHR in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1 first held that the right under article 6(3)(d) was a minimum right that must be accorded to anyone charged with a criminal offence. It was an express guarantee and could not be read as an illustration of a matter to be taken into account when considering whether a fair trial had been held. D After referring to the passage from *Lucà v Italy* 36 EHRR 807, it continued, at para 37:

> "The court notes that in the present cases the Government, relying on the Court of Appeal's judgment in *R v Sellick* [2005] 1 WLR 3257, argue that this court's statement in *Lucà v Italy* and in other similar cases is not to be read as laying down an absolute rule, prohibiting the use of E 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 *R v 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 F 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."

The court rejected the argument that the decisions in *Doorson v The* G *Netherlands* 22 EHRR 330 or *SN v Sweden* 39 EHRR 304 provided any authority to the contrary. The court then considered, at para 40, the argument on the counterbalancing measures—in particular, the correct application of the statutory tests, the judge's conclusion that it was in the interests of justice to admit the statements and the review by the Court of Appeal of the safety of the conviction. It concluded, at para 40:

H

> "The court finds these particular factors to be of limited weight since the very issue in each case is whether the trial judges and the Court of Appeal acted compatibly with article 6(1) and (3)(d) of the Convention and correctly applied the relevant case law of this court. On the basis of these observations, and on the basis of the general principles set out

at paras 34–38 above, the court will now examine the remaining counterbalancing factors relied on by the Government in each case." A

It concluded that none of the measures counterbalanced the prejudice caused to the defence by the admission of the statements.

*(vii) Our analysis of the consistency of Al-Khawaja with the case law*

**55** With respect, we consider that some further analysis is required of the statement of the ECtHR in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1, para 37 that it doubts whether there can be any counterbalancing factors sufficient to justify the introduction of an untested statement which was the sole or decisive basis for a conviction. We do so in the light of a much fuller examination of the provisions of the CJA 2003 which we have set out, at paras 11–16 above. B C

**56** It is clear in our view that the right to confront witnesses for the prosecution under article 6(3)(d) is not an absolute one. That follows from the case law of the ECtHR and is the position accepted by the Privy Council in *Grant v The Queen* [2007] 1 AC 1, paras 17(1) and 19. If it were, there would be no exception and there would be a prohibition upon *all* hearsay evidence, whether crucial or otherwise. As we have set out, the case law demonstrates that the right to confront a witness can in certain limited circumstances be restricted, provided that the trial is fair and the rights of the defence are respected. In considering whether the trial is fair, a legitimate justification for the admission of the absent witness's statement must be established and appropriate counterbalancing measures must be taken to ensure that the defendant is not placed at an unfair disadvantage and his rights respected. The adequacy of such counterbalancing measures can only be judged by the criterion whether the proceedings as a whole are fair, for once it is accepted that the right under article 6(3)(d) is not absolute, that is the only criterion against which it can be judged. This is not to say that article 6(3)(d) is merely an example of the right to a fair trial. As we have accepted, it does have a content of its own, but that content is not absolute, a point to which we return at para 79 below. D E

**57** Where the evidence before the court is that of an identified but absent witness, we can see no reason for a further absolute rule that no counterbalancing measures can be sufficient where the statement of the absent witness is the sole or decisive evidence against the defendant. That would include cases where the hearsay evidence was demonstrably reliable, or its reliability was capable of proper testing and assessment, thus protecting the rights of the defence and providing sufficient counterbalancing measures. F G

**58** In arriving at our conclusion that there neither is nor should be a rule that counterbalancing measures can never be sufficient where the evidence is sole or decisive, we have relied on a number of considerations. First, such a requirement was rejected by the Law Commission as we have set out and it was rejected by Parliament; we have referred to this, at para 17, above. Second, the code set out in the CJA 2003 provides the rigorous conditions for admissibility summarised at paras 11–15 above. Third, explicit provisions are made which enable the defence to test the credibility and reliability of the evidence by section 124 of the CJA 2003—see para 16(i) above. Fourth, such a rule, as we show in the next paragraphs has principled H

A and practical objections. The essential considerations are whether there is a justifiable reason for absence (accepted in the fifth and sixth propositions which we consider can be derived from the case law of the ECtHR) and whether the evidence can be assessed and tested so that it is safe to rely upon it—a consideration which the ECtHR has not, it appears, fully considered. Fifth, section 125 of the CJA 2003 provides an overriding safeguard which B goes to the essence of the evidence so admitted—its reliability. Sixth, the difficulties facing a defendant when an application is made to admit hearsay evidence are well understood by the courts of England and Wales; the statutory conditions in the CJA 2003 are rigorously applied. Seventh, we consider that the decision of the ECtHR in *Al-Khawaja* does not, on the analysis which we endeavour to set out in the light of a fuller consideration of the CJA 2003, justify us in departing from the decisions of this court prior C to that decision.

*(viii) The difficulties in adopting a "sole or decisive" test as an absolute test for exclusion*

**59** We therefore turn to the fourth of our reasons, the principled and practical difficulties that in our judgment prevent the adoption of a test that D would exclude any evidence contained in a statement of an absent witness on the grounds that it was sole or decisive.

**60** The principled difficulty is that it makes two assumptions. The first is that all hearsay evidence which is critical to a case will be potentially unreliable in the absence of testing in open court. The second is that the fact finder cannot be trusted to assess the weight of such evidence.

E

*(a) Reliability does not depend on the importance of the evidence*

**61** Hearsay evidence may, obviously, be potentially unreliable. So may much other evidence. The difference in the case of hearsay is that the opportunity to test it is much restricted. The whole of trial experience in England and Wales supports the proposition that confrontation and oral testing of evidence may expose either the reliability of evidence or its F opposite. But not all hearsay evidence, including that necessary to a case, is in this category of the potentially unreliable. If the woman under attack manages to get to the telephone, calls the police and screams that "X is here; he's got a knife", before being cut off, and when the police get to the house she is found dead by stabbing with no other evidence who did it, her assertion that X was responsible is hearsay. It would also be the sole or G decisive evidence. But in the absence of some unusual feature a fact finder would be fully entitled to conclude that the possibility that she was under attack from Y, but falsely screamed that it was X, is one which can be eliminated.

**62** If the drive-by shooting takes place in the street in front of unconnected members of the public (as it all too often does), one of those unconnected persons may take the number of the car as it drives away. He H or she may write it down, or telephone it to the police or to a friend. The witness may subsequently die, or may be elderly and too terrified to come to court. The evidence of the number is hearsay. The car may have been traced through the number and linked to the defendant. There is no possible basis for querying the truthfulness of the witness. As to possible inaccuracy, there

may well be no practical likelihood that the number was wrongly taken down—for example there is no other similar number, or there is gunshot residue in the car which, though not showing that it was concerned in *this* shooting effectively rules out the accidental misrecording of the number. But the car number remains an essential link in the chain of evidence connecting the defendant to the shooting: it is decisive evidence.

**63** In a less serious case, the defendant may be charged with the possession of drugs in a night club with intent to supply others. The evidence of finding the drugs on him comes from a security man, who is ill or has gone abroad by the time of the trial. The defendant remained silent throughout his interview. Although there has been no admission of possession, his lawyer has canvassed with the prosecution whether if he were to admit simple possession that would satisfy the Crown. The evidence of possession is an essential link in the chain, but although there is no admission, it will not in practice be in dispute. In a fraud case, the records of the bank may be a decisive element in the chain of evidence against the accused. It may be quite impossible to find whoever compiled the record. Unless, however, it can realistically be suggested that the unknown recorder was himself complicit in some fraud or impropriety, there is simply no reason to doubt the accuracy of the record.

**64** These are simple examples of sole or decisive evidence which does not carry such an inherent risk of unreliability that a conviction relying upon it is unsafe. Conversely, hearsay evidence which is *not* sole or decisive may carry exactly that risk. The importance of the evidence within the case is an entirely separate issue from its reliability.

**65** We note that in the different but analogous case of evidence unlawfully obtained, the ECtHR specifically held in *Khan v United Kingdom* (2000) 31 EHRR 1016, para 37 that although the evidence was the sole evidence, "In the present circumstances, where the tape recording was acknowledged to be very strong evidence, and where there was no risk of it being unreliable, the need for supporting evidence is correspondingly weaker".

*(b) A court can be trusted to assess the reliability*

**66** The second assumption to which we referred, at para 60, is equally open to error. It may certainly be that a jury which hears no oral evidence of significance and sees no witness cross-examined, may have difficulty in appreciating what has been unavailable to it. But many juries sit for several days or weeks examining evidence which is rigorously tested, and if, amongst that evidence, it receives the written statement of a witness who is ill, or dead, or frightened to appear, it is often perfectly able to understand its limitations. If it is then provided with material under section 124 of the CJA 2003 about the absent maker of the statement, and powerful arguments are presented by both sides as to what reasons, or absence of reasons, there may be for untruth or error, it cannot realistically be contended that in every case the jury or other fact finder will be incapable of making a proper decision as to what weight can be attached to the evidence. The mere fact that such evidence is an essential link in the chain by which it is sought to prove the guilt of the accused does not alter that. The evidence of the forensic scientist may be critical to the case against the accused. It may depend in part upon laboratory work done by unidentified assistants.

A To that extent it is hearsay. But the possibility that there has been error is one which can perfectly adequately be ventilated at the trial, no doubt if necessary with the aid of an independent expert instructed by the defence, without the calling of every person who worked in the laboratory at the time.

*(c) Practical difficulties*

B **67** Apart from these principled objections to the argument that the Convention requires that evidence that is sole or decisive should not be admitted, there are practical difficulties with such a test as a test of admissibility.

**68** It is clear from the judgment in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1 that the ECtHR took the view that the error had lain C in *admitting* the hearsay evidence: see in particular paras 37, 40, 42 and 46. Any test of admissibility must be one which can be applied in advance of the giving of the evidence, let alone of the outcome of the trial. A routine test of admissibility of evidence which can only be applied in retrospect, after the outcome of the trial is known, makes the trial process little more than speculative. Judge, jury, witnesses and parties may find themselves engaged D in shadow-boxing without knowing whether the solemn result of the trial will stand to be reversed on the grounds that, as things have turned out, the test of admissibility was not met. Nor can any defendant decide how to conduct his case, and indeed whether or not to plead guilty, if he does not know what evidence can and cannot be relied upon.

**69** It will no doubt often be possible to identify in advance a case in which the hearsay evidence in question is the *sole* evidence against the E accused. An obvious case is that of the single eyewitness case, with no suggested support from any other source. But this frequently may not be clear from the outset; there may be other evidence which the prosecution intends to present, but which, on hearing, turns out not to incriminate the accused, or is effectively demolished. Conversely, what appears at the outset to be hearsay evidence standing alone may sometimes come to be supported F by other material as the evidence develops. A witness may add something of great significance not previously mentioned, or the significance of something always said may become apparent when apparently unconnected other evidence is given. In any case where there is more than one accused jointly charged, it is common experience that the evidence of one may well shed enormous light upon the guilt or innocence of another. So even the concept of 'sole' evidence is an impractical test for admissibility.

G **70** It is, however, the second limb of the suggested test which is apt to cause the greatest difficulty. No one can know what evidence is decisive until the decision-making process is over. On no view can it be possible to rule in advance, at the stage when admissibility is in question, which evidence will be decisive—as is illustrated in the appeal of Marquis and Graham—see paras 142(v) below. The application of the test is made the more difficult yet if the meaning of "decisive" is extended to encompass any H evidence of which it can be said that, if it were absent, "the prospect of a conviction would have receded and that of an acquittal advanced": see para 21 of *Al-Khawaja*. Indeed, if that is the test of what is decisive, virtually all evidence would qualify; evidence which does not, if accepted by the jury, advance the prospect of conviction will ordinarily be excluded as irrelevant.

71 A further impossibility arises where the hearsay evidence is advanced not by the prosecution but by a co-accused. It may be potentially decisive, not only in the defence of Accused A, but also in showing the guilt of Accused B. The judge could not, consistently with established principles of law of England and Wales, refuse A the right to adduce such evidence if it were necessary to develop his case in defending himself. That it might end up decisive evidence (however defined) against B could not alter that rule of law.

72 It follows that as a matter of practice the concept of "sole or decisive evidence" is incapable of operating as a legal test of admissibility, as it would have to be applied in a criminal trial in England and Wales.

*(ix) The safeguard in section 125. A proportionate assessment of reliability*

73 We turn to the fifth reason—section 125 of the CJA 2003 which, as we have set out, at para 16(ii), above provides the trial judge with the express power to withdraw a case from the jury if (i) it depends in whole or in part on hearsay evidence; (ii) that evidence is unconvincing, and (iii) in consequence it appears to the judge that a conviction would be unsafe. This is specifically designed to confront the potential weaknesses to which hearsay *may* be subject.

74 For the reasons which we have endeavoured to give, it would not serve justice if this power were to be trammelled by a requirement that it be exercised in every case in which the hearsay evidence were the sole or decisive evidence. Sole or decisive hearsay evidence can be wholly convincing, indeed scarcely capable of dispute. Equally, evidence which is neither sole nor decisive might, in some circumstances, have such a potential influence upon the deliberations of the jury that the judge is persuaded that a conviction would be unsafe. Moreover, in the system in England and Wales where it is a vital principle of the administration of justice that the decision in the more serious cases is made by a jury, the detail of whose deliberations remain confidential from everyone, it cannot be known what feature of the evidence it may regard as decisive. The judge must therefore make up his own mind whether, if a conviction results, it will be safe or not. He should ordinarily do so, not at the close of the prosecution case, but at the close of all the evidence, unless of course at the earlier stage there is no case to answer. The hearsay evidence, in other words, is not to be disregarded at the stage of considering whether there is or is not a case to answer—it falls to be considered in the same way as any other evidence, in accordance with the principles of *R v Galbraith* [1981] 1 WLR 1039. But at the close of all the evidence, the judge is required, in a case where there is a legitimate argument that the hearsay is unconvincing and important to the case, to make up his own mind, not as a fact finder (which is the jury's function), but whether a conviction would be safe. That involves assessing the reliability of the hearsay evidence, its place in the evidence as a whole, the issues in the case as they have emerged, and all the other individual circumstances of the case. The importance of the evidence to the case is made a specific consideration by the statute: see section 125(1)(b). This is a particular, and not a general, task. In performing it, the judge will call upon long experience of trials, both as advocate and judge, and upon his immersion in and understanding of the

A particular trial which he is conducting. He will have the benefit of close legal and factual argument on behalf of both sides.

75 It does not follow that all hearsay evidence should automatically be admitted and any decision upon it postponed to the section 125 one at the end of the trial. Where the evidence is tendered under section 114(1)(d), the CJA 2003 requires by section 114(2) the judge to address the question of admissibility according to the interests of justice. Where the reason for B advancing hearsay evidence is that the witness is in fear, the CJA 2003 contains a similar requirement in section 116(4). In each case, further statutory considerations are provided which must be weighed by the trial Judge. It is also possible that there may be a residuum of cases where the exclusionary power conferred by section 78 of the Police and Criminal Evidence Act 1984 falls for application.

C

*(x) Our experience of the application of the safeguards*

76 We turn to our sixth reason. We accept that there can be a very real disadvantage in the receipt of hearsay evidence. Article 6(3)(d) may originally have been intended to safeguard a person from an accusation whose source is unknown—the anonymous witness—and to provide all D defendants with the same rights to call evidence as are possessed by the Crown, but as applied in present times it contains a vitally important reminder that the handicap to a defendant who cannot test evidence which is potentially unreliable and in dispute is not to be underestimated and may render the trial unfair.

77 However, we should emphasise, now that the CJA 2003 has been in force for four years, that it does not have the effect of equating hearsay E evidence to first hand evidence. On the contrary, hearsay evidence needs cautious handling.

78 That such an approach has to be adopted to the provisions of the CJA 2003 was emphasised in *R v Y* [2008] 1 WLR 1683. At para 56 the court stated:

> F "Although section 114(1)(d) as enacted does not contain the cautionary reminder, which draft clause 9 did, namely that the probative value of the out-of-court statement must outweigh the difficulties of challenging it before it will be in the interests of justice for it to be admitted, the statute as enacted is not less rigorous. That is because section 114(2) lists specific factors which must, together with any other relevant matter, be considered before addressing the question whether it G is in the interests of justice for the hearsay statement to be admitted."

After setting out those factors, the approach a court should take was set out:

> "As this court explained in *R v Taylor (Stewart)* [2006] 2 Cr App R 222, section 114(2) does not mean that the judge must hear evidence on, and make specific findings of fact about, each factor seriatim; but he must exercise his judgment in the light of consideration of all of them. Then, H after those factors, and any other relevant to the particular case, have been evaluated, the judge must stand back and ask whether it is in the interests of justice that the statement be admitted. In doing so, he will of course remember that the statute does not render hearsay automatically admissible, and the reasons why it is not. Put broadly, they are that

hearsay is necessarily second best evidence, and that it is for that reason much more difficult to test and to assess. The jury never sees the person whose word is being relied upon. That person cannot be asked a single exploratory or challenging question about what he said. Those very real disadvantages of hearsay evidence, which underlay the common law rule generally excluding it, remain critical to the assessment of whether the interests of justice call for its admission."

The court referred to other considerations and concluded, at para 59:

"Section 114(2)(i) moreover requires consideration of the injurious consequences of admission ('prejudice') to the party facing the evidence which will arise from the difficulty of challenging it. Since the burden of proving the case is upon the Crown and to the high criminal standard, very considerable care will need to be taken in any case in which the Crown seeks to rely upon an out-of-court statement as supplying it with a case against the defendant when otherwise it would have none. In such a case if there is genuine difficulty in the defendant challenging, and the jury evaluating, the evidence, the potential damage to the defendant from that difficulty is very large."

*(xi) Conclusion*

**79** For these reasons, we conclude that, provided the provisions of the CJA 2003 are observed, there is no breach of article 6 and in particular article 6(3)(d), if the conviction is based solely or to a decisive degree on hearsay evidence admitted under the CJA 2003. There is nothing in our view in the judgment of the ECtHR in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1 considered in the light of a full analysis of the CJA 2003 that leads us to conclude that this court was wrong in the result it reached in a number of its decisions in relation to article 6 and article 6(3)(d). Where the hearsay evidence is demonstrably reliable, or its reliability can properly be tested and assessed, the rights of the defence are respected, there are in the language of the ECtHR sufficient counterbalancing measures, and the trial is fair. There is therefore no reason which justifies us departing from the conclusions in that line of authority binding on us, particularly in the light of their approval in the opinion of the Privy Council given by Lord Bingham in *Grant v The Queen* [2007] 1 AC 1, para 17(2)(3).

**80** What article 6 requires is that the trial shall be fair. As we have set out, article 6(3)(d) is not simply one example of the right to a fair trial, but has a content of its own. But given that article 6(3)(d) does not create any absolute right in an accused to have every witness against him present to be examined, the balance struck by the code enacted in the CJA 2003 is a legitimate one and wholly consistent with the Convention.

**81** We conclude therefore that, applied in this way, the principled solution provided for by the CJA 2003 in relation to hearsay evidence is consistent with article 6(3)(d) of the Convention, and is not further qualified by a separate test relating to whether the evidence is sole or decisive in the case.

**82** It is not therefore necessary for us to consider the methods by which a sole and decisive test could be written into the code set out in the CJA 2003.

A *The ambit of fear*

**83** A witness who is in fear may be as effectively unavailable as a witness who is dead, ill, or overseas. In some cases, the fear will have been induced by or on behalf of the accused. Nor is it always the case that fear induced by or on behalf of the accused is limited to one of overt traceable threats. Sometimes the reputation of the accused and his associates is enough: this is
B one way in which gangs can maintain their hold on an area. The finding that the fear is induced by or on behalf of the accused may be an inevitable one if the inquiry be made: cui bono? Where the fear is attributable to the accused or his associates, it is an additional factor supporting the admissibility of the evidence, since otherwise a premium is put by the criminal justice system on the intimidation of witnesses.

**84** The case of a witness in fear is not, however, limited to fear induced
C by or on behalf of the accused. It is a melancholy fact of life that in some communities or geographical areas, a citizen is intimidated by a climate of fear from being seen to give evidence. The point is well illustrated by some of the cases considered by the ECtHR. In *Doorson v The Netherlands* 22 EHRR 330, at para 71 the court said:

> "Although, as the applicant has stated, there has been no suggestion
D that Y15 and Y16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact . . . that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them. Furthermore, the statements made by the witnesses concerned . . . show that one of them had apparently on a previous
E occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened. In sum, there was sufficient reason for maintaining the anonymity of Y15 and Y16."

In *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597, sufficient reason for anonymity was found in the reputation of the defendant, without any evidence of actual threat and in *Visser v The*
F *Netherlands* (Application No 26668/95) given 14 February 2002, para 47 in the reputation of a co-defendant.

**85** Although in such cases consideration must first be given to whether special measures can be adopted to enable such a person to give evidence, in some instances none will suffice. For the reasons explained in *R v Mayers* [2009] 1 WLR 1915, para 9, witness relocation and protection is normally incompatible with the continuation of any ordinary life, and indeed with the
G article 8 rights of the witness. So it may happen that, after all possible efforts to obtain the attendance of the witness have been made, the fearful witness is indeed as unavailable as the witness who is dead, ill or overseas. Section 116 of the CJA 2003 recognises this.

**86** In our view, the terms of section 116, like the jurisprudence of the ECtHR, do not impose the requirement that the fear must be attributable to
H the defendant. It is sufficient that the witness is in fear. No doubt Parliament took into account the well known difficulties of ascertaining the source of a witness's fear. Nor does article 6 of the Convention require this. As we have set out, it is our view that in determining whether the requirements of article 6(3)(d) have been met, two of the essential questions are whether there is a justifiable reason for the absence of the witness supported by

evidence (see the fifth and sixth propositions that we consider can be derived from the case law of the ECtHR) and whether the evidence is demonstrably reliable or its reliability can properly be tested and assessed. On this analysis, if the witness can give evidence which should be heard by the court in the interests of justice, but is clearly too frightened to come, then it matters not whether that fear was brought about by or on behalf of the defendant—there is a justifiable reason for the absence. The task of the court is to be sure that there are sufficient counterbalancing measures in place (including measures that permit a proper assessment of the reliability of that evidence fairly to take place) and to permit a conviction to be based on it only if it is sufficiently reliable given its importance in the case. The provisions of the CJA 2003 require all this to be done.

87 It is, however, important that all possible efforts are made to get the witness to court. As is clear, the right to confrontation is a longstanding requirement of the common law and recognised in article 6(3)(d). It is only to be departed from in the limited circumstances and under the conditions set out in the CJA 2003. The witness must be given all possible support, but also made to understand the importance of the citizen's duty, and indeed that the violent and intimidatory will only flourish the more if that duty is not done, whilst they will normally back down in the face of determination that it be performed. For this reason it is of especial importance that assurances are never given to potential witnesses that their evidence will be read. Unless the defendant consents, it is only the court applying the strict conditions of the CJA 2003 based on evidence that can admit such a statement. Any indication, let alone an assurance, can only give rise to an expectation that this will indeed happen, when if it does the impact of the evidence will be diminished and the disadvantage to the accused may result in it not being given at all.

88 It may well be that in the early stage of police inquiries into a prominent crime the investigators need to seek out information on a confidential basis: that is a matter for practical policing and not for us. But no person who is becoming not simply a source of information but a witness should be told that his evidence will be read, or indeed given any indication whatsoever that this is likely. The most that he can be told is that witnesses are expected to be seen at court, that any departure from that principle is exceptional, and that the decision whether to depart from it is one for the judge and not for the police. In the case before us of Marquis and Graham, as we set out at paras 127 and 132, the judge found that the investigating police officer had significantly contributed to the fear of the witness by referring repeatedly to a notorious local example of witnesses being hunted down, although relocated, and killed. Although notorious, that incident was an extreme and very unusual case. The need for police officers to tender careful advice to potential witnesses in order to discharge their duty of care towards them should not lead to such frightening information being laboured out of defensiveness. Whilst the CJA 2003 requires fear to be construed broadly, it is not to be expected that fear based upon inappropriate assurances by police officers will result in the evidence being read and the case proceeding on the basis of it to the jury. If the evidence can really only be assessed by the jury by seeing the witness, as will often be the case, it may not be admitted. If it is admitted and central to the case, there is

A a significant possibility that at the end of the trial the judge may have to rule under section 125 that a conviction relying upon it would be unsafe.

89 We therefore turn to each of the appeals before us.

*Horncastle and Blackmore*

90 Horncastle, Blackmore and James Daord were arraigned on an B indictment charging them with causing Peter Rice grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861 (24 & 25 Vict c 100) in the Crown Court at Liverpool before Judge Phipps and a jury. On the third day of a trial, 14 March 2007, Daord pleaded guilty. There was insufficient time for that trial to be completed and the jury were discharged. A second trial of Horncastle and Blackmore began in June 2007, but could not be concluded as an issue arose in relation to the forensic C evidence; the jury was discharged. A third trial took place in November 2007 and on 29 November 2007, Horncastle and Blackmore were convicted. Horncastle was sentenced to imprisonment for public protection with a minimum term of six years and Blackmore was sentenced to 12 years' imprisonment. Daord had been sentenced to ten years' imprisonment. Leave to appeal against conviction was granted by the single judge on D grounds relating to the admission of bad character evidence of a person the appellants had blamed for the attack on Peter Rice and their appeals against sentence were referred to the Full Court. In the light of the decision in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1, leave was granted in respect of the admission into evidence of the statement of the victim of the attack who had died.

E *(i) The decision to admit the statement of the deceased witness*

91 On 7 May 2005, Peter Rice, a registered alcoholic, was attacked in his flat (No 9) in a block of flats in Birkenhead. His extensive injuries included a large blood clot on the surface of the brain, a small blood clot inside the skull, fractures to the rib, cheekbone and jaw and extensive bruising. He was in hospital until 8 June 2005, but made a good recovery. F He was able to make a statement to the police on 3 June 2005. He died on 23 July 2006, prior to the first trial, from an alcohol related illness.

92 The prosecution case was that Lee Burns and Gerard (Jeddah) Murphy had burgled another flat in the block (No 23) and taken the stolen property to Peter Rice's flat (No 9). Burns and Murphy pleaded guilty to that burglary; Burns had admitted that burglary three days after the G burglary. The attack on Peter Rice had occurred when Horncastle and Blackmore had gone with James Daord (who had been staying at No 23) to recover the stolen property.

93 The defence case was that although Horncastle and Blackmore had gone to Peter Rice's flat to help recover Daord's property, neither had been involved in the attack on Peter Rice. That attack had been carried out by Gerard Murphy; Mark Jones had witnessed that attack.

H 94 The Crown applied to read his statement under section 116(2)(a) of the CJA 2003. It was opposed by the appellants on the basis of section 78 of the Police and Criminal Evidence Act 1984. It was contended that it would be unfair to admit the statement which constituted the only admissible evidence of participation against them, as there could be no opportunity to

challenge it and it was inherently unreliable. They relied on the admission by Peter Rice that he had drunk a quantity of alcohol, he had said "I don't know times and my memory is vague", and on the fact that the description given of the first male could not fit Blackmore.

**95** The judge ruled on 24 January 2007 (prior to the first trial and the plea of Daord) that the evidence should be admitted on the basis that the condition in section 116(1)(a) was satisfied; that, on the basis of the decision of the Court of Appeal in *Al-Khawaja*, the fact that it was the principal evidence against the appellants did not make it unfair. He relied in particular on the fact that the appellants had all admitted being present in the flat to recover Daord's property, the appellants were going to call Mark Jones to give evidence and that Murphy had been responsible for the attack. He would give appropriate directions to the jury.

*(ii) The evidence*

**96** The evidence relied on by the prosecution, apart from the statement of Peter Rice, was: (i) David Jones, the caretaker at the block of flats, had been told at about 5.30 p m on 7 May 2005 by Mr Hughes, the tenant of No 23, that his flat had been burgled, that the police had been told and that the TV and stereo had been stolen. Later that evening at about 10 p m, he was given by another tenant a DVD player which he had found in the lift. He had visited No 23 at about 10.15 p m and seen a person whom he knew also to be living there. The man used crutches and told him that he had recovered other items taken in the burglary and that the man from No 9 (Peter Rice) was a "robber"; (ii) Michael Broderick had been with Peter Rice during the afternoon of 7 May 2005 at No 9. He had drunk cider with Peter Rice; Rice had been drinking before he arrived. Rice was not drunk, but tipsy. He left when Burns and Murphy arrived; he did not like Murphy. He could not recall if they were carrying anything. When cross-examined about his second statement in which he had said that when Burns and Murphy arrived they were carrying a TV, he said that he saw a TV by the bedroom door, but he could not recall if they were carrying it. He had not said anything in his first statement about a TV. When he left, Rice was uninjured. He had gone to Peter Rice's flat the following morning after a telephone call from Peter Rice's sister, found him covered in blood and called an ambulance. He had visited Peter Rice in hospital where he had indicated that he had been attacked by three people, but he could not really remember who had attacked him; (iii) Garry Griffiths went to Peter Rice's flat on the evening of 7 May 2005 with Murphy and found Peter Rice lying on the floor covered in blood. He told them he did not want an ambulance. He told Murphy that it was his (Murphy's) mates from upstairs and referred to "Jimmy" (Daord). Rice showed no fear when he saw Murphy; (iv) Ian Scarisbrick (Peter Rice's brother in law), who had been out drinking, had visited Peter Rice at about 3 a m on 8 May 2005. He had been covered in blood. Peter Rice told him that he had received a good kicking off "Jimmy" and three other lads because there was a TV and stereo in his flat and he was being accused of stealing them. He refused to go to hospital; (v) the police officer who had attended to investigate the burglary at No 23 had recovered a Sanyo TV set, stereo system and DVD player. Another officer lifted some finger prints from the TV as well as a slide of blood; (vi) a forensic science officer, Geraldine Davies, gave evidence, from her examination of the blood

A distribution, that the assault was at the front door and the hallway and then at the entrance to the bedroom. There was pooling of blood at the entrance to the bedroom as if the source of the blood had lain there for some time. She was unable to say how many assailants there were; (vii) another forensic science officer, Pamela Bauer, had concluded that blood on the crutches taken from flat No 23 and belonging to Daord matched the DNA profile of Peter Rice. There was nothing on Blackmore's clothing or footwear or in B other forensic evidence to link him to the attack. If he had been present at the time of the attack and his shoes had not been cleaned, she would have expected blood spots; there was no evidence that the shoes had been wiped. The blood on the Sanyo TV found at No 23 matched that of Peter Rice. The blood on the sole of Murphy's trainer matched that of Peter Rice; the sole had been in contact with wet blood, but there were no spots on the trainers C which she would have expected to find if the shoes had been there at the time of the assault, though she could not rule it out. There was therefore no scientific evidence to link Murphy with the assault. (viii) In their police interviews both appellants had admitted going to Peter Rice's flat about 10 p m to recover what had been stolen. Horncastle had admitted taking back the TV.

D **97** The statement of Peter Rice made clear he was a long term alcoholic. He had spent the afternoon drinking with Michael Broderick, Burns and Murphy whom he described as friends. He had drunk at least three litres of cider. Burns and Murphy had gone out and returned with a TV and hi-fi system. He told them they would have to take them away, as he was due to have children around the following day. All three left in the course of the evening. Later, there was a knock at the door; he opened it and saw three E males who pushed him into the flat. The bigger male, described as a big 6'3" tall man very stocky in build, started to punch him; he gave a more detailed description, describing his hair as short light brown, aged 34 or 35 and possibly having stubble and a tattoo on his face. A male on crutches who lived on the fourth floor (a description that could only have fitted Daord) then joined in as did the third—Horncastle whom he had known for a number of years. He was dragged into the bedroom where they saw the TV. F They then went mad and punched him more. It lasted about 15 minutes. They took some things and left. The next thing he remembered was waking up in hospital.

**98** Horncastle gave evidence. He had been drinking all day with Daord and Blackstone. At about 9.30 p m, he had gone to Daord's flat with them to get cannabis. Daord said the flat had been burgled and items had been G stolen. He asked their help to recover the TV. They went downstairs to another flat where Daord went in first, followed by Horncastle. He saw a man staggering in the hallway; he had known Peter Rice since childhood, but did not recognise that it was him. Daord pointed out the items that had been stolen. He picked up the TV and returned to flat 23; Horncastle and Daord then returned to No 23 about four or five minutes later with the remainder of Daord's goods. He had not seen an assault and had not seen any blood. H He had washed his clothes, but had not taken part in an assault. They had returned to the pub. His interview by the police on 7 July 2005 was consistent with his evidence at the trial.

**99** Blackmore did not give evidence at the trial. In his interview, following his voluntary surrender to the police on 13 May 2005, Blackmore

had said he had been drinking with Daord and Horncastle. He had gone back to Daord's flat with Horncastle and Daord at about 9 p m and discovered it had been burgled. Daord asked if they would go down and recover the stuff, as he had been told where it was. They went to flat 9 at about 10 p m. The door was opened by a man who the others pushed out of the way. They saw the DVD player and the TV. He picked up the DVD player, walked out, stepping over Peter Rice who was lying on the floor. "Either he's had a crack and someone must have put him on his arse". He said he had some specks of blood on his shoes, jeans and T shirt which had come from the wall or a splatter when Peter Rice had been hit. The door closed behind him. He knew that Peter Rice was getting punched and he did not want to have anything to do with that. He did not know what happened after that. He put the DVD player in the lift. He went back to see if the others needed a hand with the TV; the lift at that point closed. He ran after the lift to try and recover it. When he came back, he went into the flat to see if he could lift the TV. Peter Rice was still lying on the floor. The others were just leaving. There was blood everywhere—on the carpets, on the walls, the doors, the ceilings and the TV. He had not hit him. He had not expected them to do what they had done. His jeans and T shirt had been washed.

**100** Mark Jones, another tenant in the block of flats, was called to give evidence for the defence. His evidence was that at about 10 or 10.30 p m he had seen Peter Rice when Peter Rice came to his door and asked for some pizza. A little later he had heard some shouting and banging; he had seen Murphy banging and asking him and Peter Rice to open their doors. Later he opened the door a little and saw Murphy holding Peter Rice in a headlock; another person was with him. He closed the door but heard a lot of shouting and noise for the next 20 minutes. He had made a statement to the police and gave answers in cross-examination which were not consistent with that evidence. The judge made clear in a ruling given during the course of the trial that the calling of that evidence did not have the consequence that the evidence of Horncastle's previous convictions would be admitted.

**101** The judge, on Blackmore's application, admitted under section 100 of the CJA 2003 evidence of Murphy's previous convictions—robbery (1994), grievous bodily harm (1995), robbery (1999), violent disorder (2000), affray (2000), child cruelty (2002), threatening behaviour (2005) and arson (2005) in addition to the burglary of flat 23; these were admitted as evidence of a propensity for violence. The judge ruled that this did not have the consequence that Blackmore's previous convictions would be admitted, as the judge did not consider that his record of previous convictions (common assaults, affray and criminal damage) was relevant.

**102** However, the judge ruled against Blackmore's application to admit evidence of a charge under section 18 of the Offences against the Person Act 1861 made against Murphy arising out of an attack on Ahmed Bashir during the course of a burglary on a flat in Birkenhead on 9 August 2007. Murphy was awaiting trial on that charge. Ahmed Bashir had received very serious injuries in the course of the burglary. Although Murphy had admitted being involved in the burglary he had pleaded not guilty to the offence under section 18. The judge ruled that it should not be admitted into evidence. There was enough evidence to show Murphy was a burglar.

A "Whether it shows that he has a propensity to commit this sort of violence in the circumstances in which there is no conviction and a lack of, at the moment before me, forensic or medical evidence, and taking account Murphy's admissions were in respect of it, I am not going to allow it in."

B *(iii) The summing up and the question from the jury*

**103** The judge made clear the importance of the evidence of Peter Rice at the outset of his review of the evidence in the summing up: "The prosecution case here depends, does it not, upon the evidence of Peter Rice."

**104** He explained to the jury that the evidence was not agreed, that the defence had not had the opportunity of testing it by cross-examination and that it would carry less weight than evidence from a witness who had come C to court and had testified. He set out examples of areas in his statement which had not been cross-examined. Just over an hour after the jury had retired, the jury asked to see Peter Rice's statement; the judge told the jurors they could not see it but reminded them of its contents by reading it to them. Unanimous verdicts were returned about $2\frac{1}{2}$ hours later.

D *(iv) The appellants' contentions that the statement of Peter Rice should not have been admitted as evidence*

**105** It was contended on behalf of both these appellants that the decision of the judge to admit the statement of Peter Rice was wrong.

**106** The initial contention made by Blackmore prior to the decision of the ECtHR in *Al-Khawaja* was that the judge's decision to admit the statement of Peter Rice was an unreasonable exercise of the discretion. E Although Horncastle was aware of that contention, his counsel did not consider that there was any basis on which Horncastle could challenge the decision to admit the evidence. The argument advanced on behalf of Blackmore was that: (i) the medical notes prior to the making of the statement indicated that Peter Rice was confused and after the statement indicated he was forgetful at times. These notes were unavailable when the F judge made his decision on the admissibility of the statement. Peter Rice had admitted that he had drunk a significant amount and his memory was very vague. The calling of Mark Jones did not counterbalance the prejudice caused, as he dealt only with events later that night and Peter Rice's statement did not address the matters raised by Mark Jones, despite the fact that the police had been in possession of Mark Jones's statement since 9 May 2005, 3 weeks before Peter Rice made his statement; (ii) the description of G Blackmore did not fit him; (iii) if the court had been able to consider the interests of justice test under section 114(1)(d) of the CJA 2003, the court should have concluded that the combination of the inherent unreliability of the statement, the denial of the opportunity to test it and the fact that without it there was no evidence of participation against the appellants meant that it was not in the interests of justice to admit it. Leave was refused by the single judge.

H **107** In the light of the decision of the ECtHR in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1, Horncastle sought leave to contend that the judge's decision to admit the statement was wrong and Blackmore relied on the decision as providing a ground on which to renew the application for leave. Both submitted that the statement was the sole or

decisive evidence against them for the following reasons: (i) Peter Rice had not named the appellants when speaking to Griffiths shortly after the attack, nor to Ian Scarisbrick on 8 May 2005 nor to Michael Broderick when he visited him in hospital prior to 3 June 2005; (ii) there was no evidence other than Peter Rice's statement linking them with the attack. In the case of Blackmore, his admissions went no further than mere presence at the time of the attack and of having left at the time the attack commenced. In the case of Horncastle, his admissions went no further than presence and of having left before the attack; (iii) there was nothing to counterbalance the prejudice caused to the defence; in addition to the points originally made, the appellants relied on the fact that no other witnesses could be cross-examined about the attack, as none gave direct evidence of it; (iv) it was of significance that the jury had asked to receive copies of the statement; this reinforced the contention that the conviction was based to a decisive degree on Peter Rice's account of the attack which could not be challenged.

*(v) Our conclusion on the evidence contained in Peter Rice's statement*

**108** There was substantial evidence independent of the statement of Peter Rice to prove that Blackmore and Horncastle went to the flat, that they were present when an attack took place and that both took away items from the flat. (i) Blackmore and Horncastle both admitted they accompanied Daord to flat 9 and were present when the door was opened; (ii) Horncastle removed the TV on his own admission. The TV had Rice's blood on it. It is an inescapable inference that Horncastle must have been present after sufficient violence had been inflicted on Rice for blood to have got on to the TV. His account that he saw no violence must have been untruthful; (iii) Blackmore admitted taking the DVD and stepping over the prostrate body of Rice. He must have been present when the violence began and he returned to the flat to help with removing the TV, despite knowing that Rice had been attacked; (iv) neither appellant contended there was anyone else other than Daord present at the time they first went to the flat or when the DVD or TV were removed; (v) the scientific evidence pointed clearly to the attack having taken place at the entrance to the flat and at the door to the bedroom which was near the entrance. The attack must therefore have been visible to anyone who remained at the entrance; (vi) it follows from the above that there was a significant amount of evidence which showed that the attack occurred in the presence of each of the appellants; (vii) there was no evidence of motive for Murphy to have attacked Peter Rice. On the contrary he was a friend of Rice's and Rice had shown no fear when he saw him with Garry Griffiths after he had been attacked.

**109** It was submitted to us that there was a basis on which it could properly be inferred that as each went to the flat with the intention of recovering the stolen property and, as at least some force was used in the presence of each, they were acting jointly. However, if this was a basis on which the case could have been put, this contention should, in our view, have been raised before the jury and the judge should have been invited to sum the case up on that basis. That was not done and it is too late to raise the issue now.

**110** Although there was the substantial evidence to which we have referred independent of Peter Rice, it is clear from the judge's ruling on the admissibility of Rice's statement, from the way in which the case was

summed up and from the question from the jury, that the evidence of Peter Rice was to a decisive degree the basis on which the appellants were convicted, if, contrary to the views we have expressed, that is the central consideration.

**111** For the reasons we have explained, in our judgment, however, the decisive nature of the evidence is but one factor the court has to put into the balance in the various stages that the court must go through in applying the statutory code. (i) The judge's decision on the admissibility of the evidence carefully applied the statutory tests under the CJA 2003; (ii) the appellants were provided with ample material to attack the credibility of Peter Rice, including the notes of his treatment in hospital; (iii) no application was made under section 125 of the CJA 2003; (iv) the judge's direction to the jury was very full. He drew to its attention the particular matters that put the defence at a disadvantage and in particular the inability to cross-examine him as to his memory, his alcoholism, his description of Blackmore and other matters; (v) there was no suggested reason why Rice, if attacked by Murphy (or even by only one or two of the three defendants who came together to his door), should have provided an untruthful statement; (vi) as to possible error, we have considered very carefully the ability of the jury to assess the reliability of his evidence contained in the statement and made our own independent assessment. We are satisfied that the jury was able to make a proper assessment. It was properly directed and the request to be reminded of the statement illustrates that the issue was given careful consideration; (vii) our own view is that the jury was right in placing reliance on that statement, as its convincing nature and reliability in important respects could be tested against other evidence, including the appellants' own admissions, the visit of three persons to the flat and taking items away, the evidence of blood on the TV removed by Horncastle, Blackmore's evidence in relation to observing Peter Rice being on the floor and the blood in the flat and the other matters set out at para 108; (viii) the appellants were provided with sufficient counterbalancing measures and their rights respected. They received considerable information about Peter Rice and his time in hospital; they were able to draw to the jury's attention all the arguments for treating the statement as unreliable. They were able to put forward an alternative case that the assault was carried out by Murphy by calling independent evidence in support. This aspect of the defence did not rely upon the appellants giving evidence, but was independent of that.

**112** If that statement had been excluded on the initial ruling as to its admissibility or the trial stopped using the power in section 125, there would have been a denial of justice in circumstances where the death of a key witness intervened prior to trial. The evidence was carefully admitted and considered by a judge and then by a jury in accordance with the statutory code enacted by Parliament. There is nothing in the Convention or in our analysis of the jurisprudence of the ECtHR that permits or requires us to hold that, given that the statutory code enacted by Parliament was followed, the defence rights have been unfairly abrogated and that the appellants have not had a fair trial.

**113** On the contrary the appellants received in our judgment a fair trial, their rights were respected and there was ample evidence to support their conviction.

*(vi) The second ground of appeal: the further evidence of Murphy's propensity for violence*

**114** Both appellants advanced the further ground of appeal based on the judge's refusal to admit the evidence in relation to the matter with which Murphy had been charged. In summary the argument advanced was: (i) after the conclusion of the trial, Murphy had on 24 January 2008 pleaded guilty to the offence under section 18 and been sentenced to imprisonment for public protection and a minimum term of 11 years specified; (ii) although it could not be argued that the judge was wrong to exclude the evidence in relation to the charge as the matter was at that time in issue, once Murphy admitted the section 18 offence, the evidence was plainly admissible and it might well have affected the jury's decision to convict; (iii) this court should therefore exercise its powers under section 23 of the Criminal Appeal Act 1968 to admit the evidence of the plea and the circumstances relating to the attack on Mr Bashir.

**115** In our judgment there was a considerable amount of evidence before the jury as to the propensity of Murphy to dishonesty and violence. The judge was right in the ruling he made. Although there is now fresh evidence before us in relation to the attack on Mr Bashir, we do not consider, applying the test in *R v Pendleton* [2002] 1 WLR 72 that it might have made a difference to the way in which the jury decided the case. First, there was sufficient evidence of propensity; second, there was no evidence of any motive for Murphy to have attacked Peter Rice and third, there was no evidence, as we have mentioned, to suggest that Rice showed any fear of Murphy when he saw him with Garry Griffiths that evening after the injuries had been sustained. This ground of appeal therefore fails.

**116** We consider that the convictions are safe and dismiss the appeal.

*Marquis and Graham*

**117** On 12 May 2008, Marquis and Graham were convicted in the Crown Court at Nottingham before Judge Bennett and a jury of kidnapping Hannah Miles on 1 November 2007. Graham had earlier pleaded guilty to offences of dangerous driving and assault with intent to resist arrest. They were each sentenced to imprisonment for public protection; the minimum term specified for Marquis was ten years, less time spent on remand. The minimum period specified for Graham was five years, less time spent on remand.

**118** The prosecution case was that at about 19.00 on 1 November 2007, six men entered the house at 19, Danethorpe Avenue in which Hannah Miles lived with her partner, Gary Price. They searched the premises and stole various items, including jewellery. After threatening her with a knife, they kidnapped her by taking her away in the car they had come in. A BMW owned by Gary Price was also taken at the same time.

**119** The case of Graham advanced by Mr Shaun Smith QC was that there had been no kidnapping; Hannah Miles and Gary Price had been involved in an attempted insurance fraud. This was not a defence put forward by Marquis; he put the prosecution to proof of kidnapping. He denied any involvement in any kidnapping there may have been.

**120** Neither Hannah Miles nor Gary Price gave oral evidence. The judge admitted the statement of Hannah Miles under section 116(2)(e) of the

A CJA 2003 on the basis that she was in fear. He did not accept the evidence that Gary Price was too frightened and refused the application made by the appellants to admit into evidence Gary Price's statement.

**121** Marquis and Graham appealed against their conviction, with the leave of the single judge, on the grounds that: (i) the statement of Hannah Miles should not have been admitted because there was no evidence that the fear had been caused by the appellants and the police had contributed hugely B to the fear. In reliance on the decision of the ECtHR in *Lucà v Italy* 36 EHRR 807, it was also contended that the evidence was the determinative or decisive evidence against the appellants, as it was the evidence that there had been a kidnapping; (ii) the judge did not properly consider the application to admit the statement of Gary Price. Furthermore it was not fair to have admitted the statement of Hannah Miles, if the C statement of Gary Price was not also admitted.

*(i) The evidence*

**122** The evidence for the prosecution, apart from the statement of Hannah Miles, was, in summary:

(i) Graham was seen with other masked men on the CCTV cameras at D 18, Danethorpe Avenue entering the house at about 19.00 on the evening of 1 November 2007. That evidence was not disputed by Graham at trial, but, when initially questioned by the police, he had not accepted that he had been to the house or that the person shown on the CCTV was him.

(ii) It was not disputed that Gary Price's black BMW X5 had been taken from outside the house shortly thereafter.

(iii) At about 19.30, Gary Price was contacted on his phone using Hannah E Miles's phone. Subsequently, a number of calls were made from Marquis's phone (884) to Gary Price between 19.58 and 20.14. The phone records which proved this were undisputed.

(iv) Matthew Seaton gave evidence (which the judge directed the jury to treat with caution). He said he had been with Gary Price at a friend's house when Gary Price received a telephone call. He answered it and looked F distressed. He could hear some of the conversation—a demand for £100,000 and a girl crying in the background. Gary Price told him that someone had taken his girlfriend and was demanding money. There were then a couple more calls. Gary Price asked him to phone the police which he did. The tape of that call recorded the person calling the police as giving a Leicestershire address and giving an account that three black males were demanding money whilst holding his girlfriend in the bathroom at her G house. Gary Price also received further calls from another phone. Seaton had recognised the 884 phone number and when he put it into his own mobile phone it registered as belonging to Bijah, the abbreviation used by Marquis for his first name. When Seaton denied that Bijah was the same person as the appellant Marquis, the judge permitted him to be treated as a hostile witness and evidence was put to him to show he knew the appellant Marquis.

H (v) Apolice officer, Inspector Nolan, gave evidence that he had called Seaton's mobile phone and spoken to a man who gave his name as Gary Price. He sounded agitated and was shouting that they had kidnapped her. He then heard a mobile ringing and was told by Gary Price it was his girlfriend's number. Gary Price asked him to listen; he had been able to hear

some of the demands for money when the two phones were held against one another. The phone rang again and he could hear a girl's voice screaming that they had taken her. When the phone went dead, Price confirmed it was his girlfriend Hannah, but he did not know where she was. He did not say where he was but he would be returning to Danethorpe Avenue shortly. Another call then took place during which money was demanded. A

(vi) The police attended at 18, Danethorpe Avenue at 19.39.

(vii) Hannah Miles's father, Christopher Miles, gave evidence that he had received a phone call between 20.30 and 20.45 on 1 November 2007 from his daughter. She told him that she had been kidnapped and needed to be picked up. She sounded distressed. He collected her and she gave him an account of what she said had happened. She had tried to contact her partner, Gary Price, on the phone, but had had no answer. They went to 18, Danethorpe Avenue to see if he was there. When they arrived at the house, two of her friends were there and asked what had happened. She gave an account, tearful and shaken. He searched the house, but Gary Price was not there; he found lukewarm water in the bath. He phoned the police. Before they came again, she gave an account of what had happened which was consistent with the statement she subsequently gave. B C

(viii) Marquis spent the night of 1/2 November 2007 at the Castle Marina Holiday Inn at Nottingham. The evidence of Keelie Haye was that she went to the hotel to meet him; she was told to park her car between a red van and "my X5". When she went up to his room, she was introduced to a man (whom Marquis refused to identify when giving evidence). She saw a pink phone which was identical to the one owned by Hannah Miles. D

(ix) It was accepted that the 884 phone used to telephone Gary Price to make the demands which the police officer heard was used by Marquis to contact Keelie Haye between 31 October and 2 November 2007. A text to her from Marquis at 01.35 stated: "Hey don't let no one know where I am, you know. Remember I know your address and that. You should have just said you were going. I ain't bothered, but if I get arrested, I know it's you". E

(x) At about 13.03 on 2 November 2007, the CCTV at the Top Valley Way Tesco at Nottingham showed Marquis and Graham together in the store and Graham was seen at the wheel of the car. Graham was seen at the same location at 20.25 that day also driving Gary Price's BMW; by then it had false registration plates. A pursuit ensued and Graham was arrested; a knife was found in the car. There was also evidence that a man describing himself as John Graham rented a room at the Castle Marina Holiday Inn on 1 November 2007 and had described himself as the driver of a black BMW X5. F G

(xi) Graham pleaded guilty subsequently to dangerous driving and assaulting a police officer in relation to the events before his arrest. When interviewed, he answered "no comment" to all questions. He explained that he had the car as he was doing someone a favour by trying to find a buyer for it.

**123** After his arrest on 14 November 2007 Marquis gave a no comment interview. He did give evidence at trial, denying any role in the kidnapping. He stated that his phone (884) had been used by him between 31 October and 2 November 2007 to contact Keelie Haye, but he had lost the phone when he got into a car owned by some men on the afternoon of 1 November 2007 and did not get it back from them until he was at the Castle Marina H

A Holiday Inn where he had agreed to meet the men, book a room and invite girls. The phone was therefore not in his possession when the calls were made to Gary Price. He would not identify the men. When he went to the room at the hotel, the pink phone was already there, but he had no idea how it had got there. As to being at the Top Valley Way Tesco, he did not want to name whom he met there. He did speak to Gary Price but this was because he had been told the latter wanted to speak to him. Gary Price had told him
B that he had been phoned by a person using Marquis' phone number and he wanted to know if he (Marquis) knew anything about it. He told Gary Price he knew nothing about it, but Gary Price said somebody had wanted to buy his car, went to his house, left a deposit and took a lap top, some drugs and the car without paying for it. Marquis said again he did not know the people, but he would see what he could do. There was a second call in which
C Gary Price had been trying again to find out what had happened.

**124** Graham did not give evidence. He provided no evidence from any person which would have formed a basis for the case that the kidnapping was an attempted insurance fraud. The allegation was simply put to Seaton who denied it. It was none the less advanced as part of the defence case to the jury, despite the absence of any evidence.

D *(ii) The evidence of Hannah Miles and the decision to admit it*

**125** On 1 November 2007 Hannah Miles made a statement giving an account of her movements on 1 November 2007. She stated that, as she was about to bathe, two masked men entered her bedroom; one had a knife. She was ordered downstairs where there were four other men. They asked where the jewellery, money and car keys were. They then took her to the car
E they had come in; four men were with her and they drove off. They asked for Gary's number which she gave them and they phoned him. She then described the phone conversations that followed. She was told by those that had kidnapped her that she should not go to the police because she would know what would happen to her if she did. She was put in the boot for a while before being dropped off unharmed. After unsuccessful attempts to
F phone from various locations, she eventually spoke to her father who picked her up. She did not identify any person.

**126** On 2 and 3 November 2007 she made further statements adding more detail.

**127** On 4 November 2007, Inspector Griffin visited Hannah Miles and Gary Price in the presence of Hannah Miles's father and told them "in no uncertain terms" that the men the police were seeking were dangerous and
G that it was not beyond them to use guns against Hannah Miles and Gary Price. He gave as an illustration the use of guns against the Stirland family who had fled from Nottingham in 2006 and been murdered in a Lincolnshire village to which they had been relocated. He spoke to them about moving. Gary Price responded that he could look after himself.

**128** On 22 November 2007 she made a statement stating that she
H wished to retract her previous statements and did not want the police to pursue a prosecution, as she was scared for the safety of her family.

**129** She did not attend court on 4 April 2008 in compliance with a witness summons that had been issued for the trial which was due to start on 7 April 2008. She was arrested. On giving an explanation to the judge that, although she was frightened, she would have attended court if she had not

been told not to attend by Witness Support prior to 4 April 2008, she was bailed to appear on 9 May 2008, with the trial fixed for 12 May 2008. Keelie Haye had also been summoned to attend court on 4 April 2008 because it was feared she would not attend in the light of threats made against her. She had failed to attend for the same reason and had also been arrested. A

130 Hannah Miles made a third statement on 9 April 2008 which was video recorded. In it she said that she had made the statement of 22 November 2007 because she was scared. She thought that those who had kidnapped her were dangerous and was very frightened. She said: B

> "Since I have been kidnapped, I've found that the incident has altered my life. I'm petrified. I find myself looking over my shoulder and wondering if the people responsible will come and get me. I feel like this because at the time they said to me, 'you'd better not go to the police, 'cos you know what will happen if you do'. I perceive this as a direct threat against me and I just don't know what they are capable of, considering that they forced their way into my house and kidnapped me. I perceive them as very dangerous people." C

She added that the police had made her more frightened when they told her that she and Gary had to move. She did not feel she could leave her house for fear of what might happen to her and her anxiety had been increased by the court case. She was prepared to give evidence, but only if she could do so from behind screens. She said she had not been subjected to any threats directly or indirectly from those responsible for kidnapping her, but she still felt scared. D

131 She did not attend on 9 May 2008. Her father's evidence to the trial judge was that she had fled the day before. On 12 May 2008, the Crown applied to read her statement and that of Gary Price under section 116(2)(e) of the CJA 2003 on the grounds that they would not give evidence through fear. E

132 On 13 May 2008, the trial judge heard evidence from Hannah Miles's father and Inspector Griffin which covered the matters we have set out, at para 127, in relation to what had happened on 4 November 2007. Her father also gave evidence that she was scared about coming to court. The judge concluded that Inspector Griffin, though acting entirely in good faith to protect the witnesses, had imparted real fear in Hannah Miles: "Having heard all the evidence, the only sensible conclusion is that she was and is so terrified of coming to court to give evidence, she would rather face arrest and imprisonment. I have no doubt she is in fear of giving evidence." F

133 The appellants had contended that the statement could not be admitted as her fear was not fear within the meaning of section 116(2)(e), as the fear had not been generated by any action of the appellants or their associates, but by what Inspector Griffin had said. The judge rejected this contention and concluded that, whether or not there had been some independent act by or on behalf of either of the appellants, there was power under section 116(2)(e) of the CJA 2003 to admit her statement as she was a witness in fear. The judge then considered whether it would be unjust or unfair to admit it; he concluded it would not. In the same ruling he declined to admit the evidence of Gary Price, but as the appellants contend as the second ground of the appeal that he should have done so, it is necessary to set out the circumstances. G H

A *(iii) The refusal to admit the evidence of Gary Price*

**134** On 1 November 2007 Gary Price made a short statement setting out his account of the ransom demands and how Hannah Miles would have her fingers cut off if he did not pay the ransom. On 22 November 2007 he made a statement in terms similar to that made by Hannah Miles.

**135** He also did not attend court on 4 April 2008 and a warrant was
B issued for his arrest. He surrendered into custody on 16 April 2008, but, on his assurance he would give evidence at the trial in May, he was also bailed to attend. He also made a statement on video on 16 April 2008. In that statement he said that he tried to get in touch with Marquis because he blamed him for what had happened; Marquis had rung him, but it was clear when Marquis rang that this was not the person who had
C rung him on the phone that had had Marquis's number (884) on 1 November 2007. Marquis had explained to him that he had sold the phone the week before.

**136** He did not attend at the time he was required to attend and a warrant was issued for his arrest. He could not be found. The prosecution also applied to read his statement under section 116(2)(e), but the judge concluded in the ruling he gave on 13 May 2008 that, in the light of the
D video statement on 16 April 2008 and other evidence, his non attendance was not due to fear and therefore declined to allow his statement to be read.

**137** On 15 May 2008, an application was made to the judge to admit Gary Price's statement made on 16 April 2008 in the interests of justice under section 114(1)(d) of the CJA 2003 so that it could be advanced as part of the defence case of Marquis. It was submitted that Marquis was put at a
E great disadvantage because they could not cross-examine him in relation to the voice heard when the 884 phone rang. The judge refused the application on the basis that Gary Price was not in fear and he was not prepared to go behind his ruling; the evidence covered many matters which implicated the appellants and not just that part of it relating to the recognition of the voice on the 884 number.

F **138** Subsequent to the trial, Hannah Miles and Gary Price were arrested and brought before a court.

*(iv) The statement of Hannah Miles was properly admitted and considered by the court under the CJA 2003*

**139** In our view the judge in his careful ruling properly applied the
G statutory provisions and rightly admitted the statement of Hannah Miles. For the reasons we have set out at paras 83–88, we also consider that the judge was correct in his ruling as to fear. The directions given to the jury were appropriate in relation to the way in which they should treat Hannah Miles's statement and the disadvantages to the appellants in not being able to cross-examine her.

**140** Furthermore there was sufficient material before the jury which
H enabled them properly to assess the reliability of her statement. We also consider that its convincing nature and reliability in important respects could be tested against other evidence including: (i) that when the police visited the house, the bath had lukewarm water in it; (ii) that a knife was recovered from the BMW in which Graham was arrested; she identified it as the one used on

her; (iii) that Gary Price was phoned using her phone and an identical phone was seen in the bedroom at the Castle Marina Holiday Inn used by Marquis.

**141** In considering the overall fairness of the decision to admit the evidence of Hannah Miles and in looking at the safety of the conviction, we have taken into account the criticism of the judge's refusal to admit the statement of Gary Price. Marquis sought to admit only part of his evidence contained in the statements. The judge had concluded that Gary Price was not in fear and could have attended. To have admitted the whole of the evidence in those circumstances would not have been in accordance with the statutory code and to have admitted part of it on Marquis's application would have been to provide evidence that was misleading without the rest of the evidence.

*(v) The significance of Hannah Miles' evidence: it was not decisive*

**142** In this appeal, it is in our view clear that the convictions did not rest on the evidence of Hannah Miles to a decisive extent. (i) The main evidence against Graham was that there was clear CCTV evidence that Graham had been at the house at the time Hannah Miles said she was kidnapped; he admitted that, though in his interview he had not accepted that. He was arrested in Gary Price's stolen BMW X5. Hannah Miles's statement did not identify him; (ii) the main evidence against Marquis was that his phone was used to make the ransom demands heard by Seaton and Inspector Nolan. It was not disputed that a phone identical to one owned by Hannah Miles was seen by Keelie Haye when she went to Marquis's bedroom at the Marina Castle Holiday Inn. Hannah Miles's statement did not identify him; (iii) the only matter proved by Hannah Miles's statement was that she had been kidnapped. There was, however, sufficient evidence of that from the other witnesses in the case, particularly her father; (iv) there was no evidence to support the case advanced by Graham that the kidnapping was an attempted insurance fraud; (v) counsel for the Crown had submitted in his application to the judge to admit the statements of both Gary Price and Hannah Miles that they were central to the case. However, the fact that this submission was made is an illustration of the difficulty we identified, at para 70, above of determining in advance whether the evidence is decisive. Self evidently the evidence of Gary Price made no difference, as it was not admitted and in the result, for the reasons we have given, the evidence of Hannah Miles was not, in the event, decisive; (vi) thus, if, contrary to the view we have expressed, a statement of a person kept away by fear could not be relied upon as evidence of a decisive extent in favour of a conviction, then, as the conviction rests on other evidence, that ground of appeal fails for that additional reason.

**143** In the light of all the circumstances, we consider that the evidence was properly admitted, that the jury was entitled to rely on the statement of Hannah Miles and that it was in our judgement reliable. Defence rights were respected, the trial was fair and the conviction safe.

*Carter*

**144** On 22 October 2008 the appellant Carter was convicted in the Crown Court at Reading before Judge McIntyre and a jury of ten counts of distributing indecent photographs of children. Leave to appeal against conviction was granted by the single judge.

A *(i) The investigation*

**145** After the arrest in Cornwall of Derek Holloway by the Devon and Cornwall Constabulary and an examination of his computer in 2002, a large number of obscene images of children were found to have been received between January and February 2002 from "manicxc@aol.com". An inquiry of AOL, the provider of the e-mail address was made on 10 March 2005 by
B the Devon and Cornwall police under section 22 of the Regulation of Investigatory Powers Act 2000 ("RIPA") in relation to that and other addresses. AOL answered the inquiry on the same day in a memorandum which gave the name of the appellant Carter and his address in Sandhurst as the holder of the address—"manicxc@aol.com". The memorandum stated that the information was provided pursuant to the request made under
C RIPA subject to four provisos, the first of which was in the following terms:

> "1. This data is extracted from the information provided by the subscriber during the registration process for AOL. We assume and expect that the data supplied to us by the member is accurate. However you should be aware of the possibility that the user of the e-mail account may not be the above named account holder, but another unidentified person having obtained access to the account . . ."

D The other provisos made clear that the information was only to be used for intelligence purposes and for no other purpose. It made clear no witness statement would be provided.

**146** The memorandum was forwarded to the Thames Valley Police. On 22 September 2005, Carter's home was searched. His computers were seized and subsequently examined. No indecent images were found. On one
E of the computer hard drives the AOL user profile "manicxc@aol.com" was found. That profile had been used in September/October 2002. There was no evidence that it had been logged in at the time the e-mails sending the indecent images of children had been sent to Mr Holloway in Cornwall; there was no other evidence to show that any computer seized from the appellant had been used to send the indecent images.

F **147** On 17 May 2007, Carter was arrested and interviewed; he said he did not know Holloway and did not use the manicxc@aol.com address. He said that his lodger may have been responsible. He had used an address "manicxd@aol" which he had cancelled in 2000 but could not recall manicxc@aol.com. He did not name his lodger in the interview, as he said he did not want him to be convicted. He did name the lodger at the trial but
G said he had not managed to find him.

*(ii) The issue as to hearsay*

**148** At the commencement of the trial the appellant's counsel provided the Crown and the court with a skeleton argument making clear that the appellant objected to the admission of the memorandum dated 10 March 2005 from AOL on the basis that it did not satisfy the requirements of
H section 114 and section 117 of the CJA 2003 for admission as hearsay. Reliance was also placed upon the failure to give the requisite notice. It was submitted that: there was no statement from the person who had written the document; the accuracy of information was qualified and the prosecution had taken no further steps to confirm its accuracy. The skeleton argument

identified the detailed reasons why the provisions of section 114 and 117 had not been met. An argument was also advanced under section 78 of PACE that it would be unfair for it to be adduced. It was contended that it was therefore not permissible for the Crown to rely upon the document to prove that Mr Carter had subscribed to the "manicxc@aol.com" address.

**149** Counsel for the Crown told us that when he received the skeleton argument, he explained to the appellant's counsel that the document was not in any way central to their case. The case against the appellant was based on the fact that a hard drive found at his home contained evidence that the user of that hard drive had used the e-mail address "manicxc@aol.com" to send e-mails. In the absence of explanation the jury could infer that the appellant had used that address. The sole purpose for introducing the AOL memorandum was to explain why the police had visited and searched the appellant's home. The Crown offered to proceed without the document, if the jury could be given an explanation as to why the appellant's home was searched.

**150** The matter was not resolved when the trial began. Counsel for the Crown told the judge of the AOL memorandum and the limited way in which the Crown sought to use it; the AOL memorandum was not relied on for the truth of its contents. It was, therefore, not hearsay. No application was made to admit the AOL memorandum under the CJA 2003. After the judge had been told this, the appellant's counsel maintained the position set out in his skeleton argument that the document was hearsay and inadmissible because it did not satisfy the requirements of the Act for the reasons set out in the skeleton.

**151** The judge made no formal ruling but in the course of argument he made it clear that he considered that the requirements of section 117 had been met on the apparent basis that it was information supplied in the course of a business. He said:

> "The document contains the statement on which the prosecution rely. It is simply a question of in whose name the e-mail address account was registered, and AOL say it is David Carter and I do not see what else AOL could reasonably be expected to say when asked for that information . . . I think the document on its face quite clearly satisfies the provisions of section 117."

**152** Discussions then took place between counsel as to what should happen. The AOL memorandum was put before the jury. We were told by counsel for the Crown that the jury had never been asked to use the AOL document in any way adverse to the appellant. The jury was told that the only reason that it had been provided with it was that it gave the explanation as to why the police had visited and searched the appellant's home.

**153** In his direction to the jury, the judge did not explain to the jury the use that it might make of the document or why it was before them. He said simply: "And you have got the letter from AOL . . ."

**154** We accept that counsel for the Crown did tell the jury the limited purpose for which the document was before the jury. However the judge failed in his directions to the jury to give to them any directions as to the use they could make of it. It was contended by counsel for the Crown that the reason the judge did not explain the use that could be made of the document

A was because it had not been admitted as hearsay and only for a very limited purpose.

**155** We cannot accept that contention. It plainly was a document that the jury could have considered as containing evidence which was adverse to the appellant. The judge should have explained to the jury that the statement by AOL was not evidence against the appellant and that it had only been given to them to explain why the police had visited the B appellant's home and searched it. It is perhaps not surprising that no such explanation was given to the jury as the terms of the judge's ruling made it appear that the judge did regard the statement as hearsay evidence that was admissible against the appellant. If that had been the position, then the judge would have failed to follow the provisions of the CJA 2003 as to the admissibility of the evidence and have failed to give proper directions C to the jury.

**156** Given the position taken by the Crown, it is not necessary for us to consider whether the document was admissible as hearsay, as the Crown never sought to rely upon it for that purpose. As we have emphasised, if the Crown had sought to make that contention, then the judge would have had to apply the provisions of the CJA 2003 in considering whether it was admissible. In particular the judge would have had to consider whether the D stricter provisions of section 117 applied to the AOL memorandum dated 10 March 2005 as a document created for the purpose of the criminal proceedings. If it was, then the prosecution would need to have produced the original record and evidence to support that: see para 15 above.

**157** The judge's failure to explain the use that might be made of the document was a material misdirection, as without such direction the E document could have been used by the jury to link the appellant to the e-mail address.

**158** We cannot regard the conviction as safe and accordingly allow the appeal.

*Appeals against sentence by Horncastle and Blackmore*

F **159** The judge rightly described the attack as one of great violence which inflicted life threatening injuries; it was carried out to inflict punishment on a person vulnerable because of his alcoholism. He also rightly determined that there was no distinction between the appellants and Daord as regards culpability.

**160** In our judgment the judge was not in error in imposing a determinate term of 12 years for such an attack; the sentence imposed on G Daord was reduced to reflect his guilty plea and the time at which it was made. There is accordingly no merit in the appeal of Blackmore and we refuse leave.

**161** Horncastle had convictions for a number of serious specified offences, including robbery, attempted robbery and threats to kill and for two specified offences—assault occasioning actual bodily harm and affray. The judge took into account the statutory presumption that there was in his H case a significant risk of serious harm being caused by the commission of serious specified offences. He concluded that, although there might well have been no serious harm caused to the victims of the previous offences, the present case showed an escalation in the seriousness of the violent offending. That view was supported by the assessment in the pre-sentence report that

there was a high risk of reoffending. He concluded that Horncastle was a very dangerous young man and it was not in all the circumstances unreasonable to make the statutory assumption.

**162** It was submitted on behalf of Horncastle that, because the judge had concluded that Daord and Blackmore were not dangerous, the judge must have concluded that the offence in itself did not demonstrate that the offenders presented a significant risk of serious harm to the public; given that his previous pattern of offending had resulted in only minor injuries and the previous offences were all connected with drink and drugs, the judge should not have found Horncastle dangerous.

**163** In our view, the judge correctly took into account all the circumstances. He carefully evaluated the previous offending and the present offence. He was in the circumstances entitled to conclude that Horncastle was in fact dangerous.

**164** Accordingly we refuse leave to appeal against the sentences.

*Appeals against conviction by defendants in first two appeals dismissed.*

*Applications by defendants in first appeal for leave to appeal against sentence refused.*

*Appeal against conviction by defendant in third appeal allowed.*

*Certificate pursuant to section 33(2) of the Criminal Appeal Act 1968, as amended, that points of law of public importance were involved in the decision, namely: "(1) Do article 6(1) and article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms have the consequence that a conviction, in which hearsay evidence admitted under the Criminal Justice Act 2003 is the sole or decisive evidence, is necessarily unsafe? (2) Under article 6(1) and article 6(3)(d), (a) is the only case where such a conviction is safe one in which the hearsay evidence was admitted because the witness was in fear and, if so, (b) what is the ambit of 'fear' for this purpose? In particular is it limited to the case where the fear is engendered by the defendant and/or on his behalf?"*

*Leave to appeal.*

C B

A **APPEALS** from the Court of Appeal (Criminal Division).

The defendants in the first two appeals appealed.

The facts are stated in the judgment of Lord Phillips of Worth Matravers PSC.

*Tim Owen QC* with *John A Gibson* and with *Janet Reaney* (instructed by *Johnson Partnership, Nottingham*) for the first and second defendants
B respectively in the first appeal.

It is a denial of a defendant's right to a fair trial under article 6(1)(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms if, through no fault of his own, he is unable effectively to challenge the "sole or decisive" evidence against him by oral cross-examination.

C In domestic law the court has not adopted that absolute approach. While accepting the relevance of the European Court of Human Rights jurisprudence, it has considered the admissibility of evidence to be primarily a matter for national law: see sections 114–126 of the Criminal Justice Act 2003; Auld LJ's *Review of the Criminal Courts of England and Wales* (2001), ch 11; William E O'Brian, "The Right of Confrontation: US and European Perspectives" (2005) 121 LQR 481; Law Commission's
D Consultation Paper (1995) (Law Com No 138) and Report (1997) (Law Com No 245) (Cm 3670) on *Evidence in Criminal Proceedings: Hearsay and Related Topics*. Adopting a flexible approach, the courts, applying the 2003 Act, have concluded that what matters is the fairness of the proceedings as a whole and that a conviction based solely or to a decisive extent on the statement of an absent witness does not necessarily violate the
E right to a fair trial under article 6 where the reliability of such a statement can be assessed, having regard to the available counterbalancing factors: see *R v Forbes* [2001] 1 AC 473; *R v M (KJ)* [2003] 2 Cr App R 322, paras 57–58, 60–61; *R v Arnold* [2005] Crim LR 56; *R v Sellick* [2005] 1 WLR 3257, paras 46, 49–51, 56–57; *R v Al-Khawaja* [2006] 1 WLR 1078, para 26; *R v Tahery (Alireza)* [2006] EWCA Crim 529; *R v Cole* [2007] 1 WLR 2716, paras 14, 20; *R v Mayers* [2009] 1 WLR 1915 and *Grant v*
F *The Queen* [2007] 1 AC 1.

In sharp contrast is the position in the United States of America where the constitutional principle of confrontation is strictly applied: see *Crawford v Washington* (2004) 124 S Ct 1354; *Melendez-Diaz v Massachusetts* (unreported) 25 June 2009; *Ohio v Roberts* (1980) 448 US 56 and *Coy v Iowa* (1988) 487 US 1012. See also Richard D Friedman, "Thoughts from
G Across the Water on Hearsay and Confrontation" [1998] Crim LR 697 and William E O'Brian, "The Right of Confrontation: US and European Perspectives" 121 LQR 481.

The clear and constant jurisprudence of the European Court of Human Rights recognises orality as the central method of testing evidence and that a conviction based solely or to a decisive extent on statements from witnesses whose testimony the defendant has been unable to examine either before,
H during or after the trial, will violate his rights under article 6: see *Lucà v Italy* (2001) 36 EHRR 807, paras 37–40; *X v United Kingdom* (1992) 15 EHRR CD 113; *SN v Sweden* (2002) 39 EHRR 304; *Doorson v The Netherlands* (1996) 22 EHRR 330, para 76; *PS v Germany* (2001) 36 EHRR 1139, paras 26, 30; *Van Mechelen v The Netherlands* (1997)

25 EHRR 647, para 55; *Windisch v Austria* (1990) 13 EHRR 281, paras 30–31; *AM v Italy* Reports of Judgments and Decisions 1999-IX, p 45, paras 25, 26, 28; *Unterpertinger v Austria* (1986) 13 EHRR 175, paras 31, 33; *Bricmont v Belgium* (1989) 12 EHRR 217, paras 81, 104; *Kostovski v The Netherlands* (1989) 12 EHRR 434, paras 42, 44; *Delta v France* (1990) 16 EHRR 574, para 37; *Asch v Austria* (1991) 15 EHRR 597, para 28; *Lüdi v Switzerland* (1992) 15 EHRR 173, paras 42–50; *Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, paras 20, 23–24; *Saïdi v France* (1993) 17 EHRR 251, para 44; *Ferrantelli and Santagelo v Italy* (1996) 23 EHRR 288; *Trivedi v United Kingdom* (1997) 89-A DR 136; *Taxquet v Belgium* (Application No 926/05) (unreported) given 13 January 2009; *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597; *Birutis v Lithuania* (Application Nos 47698/99 and 48115/90) (unreported) given 28 March 2002; *Visser v The Netherlands* (Application No 26668/95) (unreported) given 14 February 2002; *Krasniki v Czech Republic* (Application No 51277/99) (unreported) given 28 February 2006 and *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.

The "sole or decisive" test is not inherently impracticable or otherwise unworkable in the context of the domestic trial system. The test is clear and simple, in contrast to the alternative formulated by the Court of Appeal which assumes that the trial or appellate court is able to reach a fair and proper conclusion as to whether hearsay evidence is demonstrably reliable, or that its reliability can be tested and assessed despite the defence's inability to cross-examine the maker of the statement. It is a crucial requirement of a fair criminal trial that an important, "decisive" witness is subject to testing by way of oral cross-examination. By that means his demeanour can be observed by the tribunal of fact; the witness' perception, memory or sincerity can be questioned; a statement may not have been accurately recorded; mistakes, exaggerations or deliberate falsehoods would go otherwise undetected; and an incriminating statement should be repeated in the course of formal proceedings so that the witness commits to its truth and can be observed and heard when called upon to explain or defend it: see the Auld Review, ch 11, paras 79–80.

The Strasbourg jurisprudence determines how hearsay evidence is admitted under the Criminal Justice Act 2003 in relation to absent witnesses, save where their absence has been induced by the defendant's own conduct. The domestic court is required to take account of the decisions of the European Court of Human Rights decisions and to adopt its clear and constant jurisprudence: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323; *Brown v Stott* [2003] 1 AC 681; *Saunders v United Kingdom* (1996) 23 EHRR 313 and section 2(1)(a) of the Human Rights Act 1998. The practical effect of the duty imposed by that section is that the court should apply a decision of the Grand Chamber despite the existence of House of Lords authority to contrary effect: see *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269 and *Secretary of State for the Home Department v MB* [2008] AC 440. The domestic court accepted (see the *AF* case) that there is a core irreducible minimum requirement that there can never be a fair civil trial if the basis of administrative decision was founded "solely or to a

A decisive degree" on closed material: see *A v United Kingdom* (2009) 49 EHRR 625. The test applied in that case was substantially the same as that set by the European Court of Human Rights in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1, albeit in a non-criminal trial context. The same test was applied in *R v Davis* [2008] AC 1128 and recognised in *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393, para 10; it is
B also required by section 5 of the Criminal Evidence (Witness Anonymity) Act 2008.

The European Court of Human Rights has therefore established a clear and constantly applied principle to the effect that the admission of a statement from an absent witness whose testimony provides sole or decisive evidence at a criminal trial will breach article 6(1)(3)(d). There can be no fair trial where the defendant has not had the opportunity, at any stage in
C the criminal process, to challenge the witness' evidence by oral cross-examination. The possible exception where the defendant has himself caused the absence of the missing witness does not apply in the present case. By declining to follow the clear jurisprudence of the European Court of Human Rights when the facts could not be distinguished from the *Al-Khawaja and Tahery* case the Court of Appeal acted contrary to its duty
D under section 2(1)(a) and section 6 of the 1998 Act.

*Shaun Smith QC* and *James Beck*, solicitor (instructed by *The Johnson Partnership, Nottingham*) for the defendants in the second appeal

Where a witness is absent from a criminal trial through fear, a number of principles can be inferred from the statutory materials and the case law as to whether his statement is admissible: (a) the test as to whether a witness is
E prima facie in fear is subjective and the definition of "fear" is widely drawn; (b) the test as to the reasonableness of a witness's fear is objective; (c) in deciding whether to admit the written statement of a witness held to be in fear, the court is required to carry out a balancing exercise between the rights of the defendant to a fair trial and the rights of victims and witnesses, and the court should be slow to put the witness's rights above those of the defendant; (d) the fear must be incapable of being assuaged by the taking of
F special measures; (e) the fear must not be generated by those in authority to prevent a witness giving live evidence; (f) where fear is proved to have been generated by the defence the law is settled that any statement provided by the witness will be excluded; (g) whether the witness is in fear should be ascertained at the time of trial or very near to it; (h) where a witness asserts that he or she is in fear of the party wishing to have the statement read, that
G party must show that all reasonable steps have been taken to secure the witness's attendance at court; (i) the burden of establishing that a witness is in fear lies with the party wishing to adduce the statement; and (j) the standard of proof is to the criminal standard: see section 116 of the Criminal Justice Act 2003; sections 23 and 26 of the Criminal Justice Act 1988; the Law Commission's report on *Evidence in Criminal Proceedings: Hearsay*
H *and Related Topics* (1997) (Law Com No 245) (Cm 3670), paras 1.40, 1.41, 4.42, 8.29, 8.30, 8.50, 8.60–8.64 and 8.66; *R v Acton Justices, Ex p McMullen* (1990) 92 Cr App R 98, 105–106; *R v Martin* [1996] Crim LR 589; *R v H* [2001] Crim LR 815; The Times, 6 July 2001; *R v Littlechild (Andrew)* [2002] EWCA Crim 1784; *R v M (KJ)* [2003] 2 Cr App R 322; *R v Arnold* [2005] Crim LR 56; *R v Sellick* [2005]

1 WLR 3257, paras 37, 57; *R v Doherty (Michael)* (2006) 171 JP 79 and *R v Davies* [2007] 2 All ER 1070, paras 14, 15. A

The Strasbourg jurisprudence establishes that the admissibility of evidence is a matter for regulation by national law and as a general rule it is for national courts to assess the evidence before them. Contracting states are therefore required to arrange their criminal proceedings so that the interests of witnesses and victims are not imperilled and in an appropriate case their interests are to be balanced against those of the defence: see *Kostovski v The Netherlands* 12 EHRR 434; *Doorson v The Netherlands* 22 EHRR 330; *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597; *Visser v The Netherlands* given 14 February 2002 and *Krasniki v Czech Republic* given 28 February 2006. B

In declining to make fear an automatic exception to the hearsay rule and by creating a separate section of legislation Parliament indicated its intention that cases involving witnesses who did not attend to give evidence through fear were to be treated with caution: see Law Commission Report (1997), paras 1.40, 4.42, 8.58, 8.60, 8.62 and Consultation Paper No 138 (1995), para 7.22. That intention was born of the existence of a general and real risk that, if the statements of frightened witnesses were automatically admissible, prospective witnesses could give statements to the police in the knowledge that they could later falsely claim to be frightened so as to avoid having to go to court to be cross-examined: see the Law Commission Report, para 8.58. If unregulated, there will be a drift towards automatic admission and the dangerous possibility of trials without live evidence. All steps should be taken to get the witness to give live evidence; that course, from the viewpoint of the defence, is infinitely preferable, but a live anonymous witness who is before the court and available for cross-examination, is preferable to a statement read from an absent witness. While no adverse comment can be made in respect of a witness who is silent through absence, such comment may be made of a defendant's silence. It should therefore only be in cases where the fear has been proved to be engendered directly by the defence that a court is automatically entitled to disregard the sole or decisive test. C D E

In all other cases where fear is asserted, any decision should be case-specific, based on a close and rigorous examination of all the facts, made at the date of the trial or proximate to it, by the use of the TV link procedure and subject to cross-examination by defence counsel. The court itself must be proactive in assessing the claimed "fear" and it cannot rely on police evidence of such fear: see *R v T (D)* (2009) 173 JP 425. Difficulties arise where the fear is generated, not by the defence, but by those in authority, such as the police. Section 116(5) of the 2003 Act does not deal with fear other than that generated by the defence. The relevant fear cannot be a simple fear of the proceedings themselves; the fear exception is designed to facilitate the acceptance of evidence from intimidated witnesses, not just those scared of the process of giving evidence: see Report, para 8.66 and *Speaking Up for Justice*, the Report of the Interdepartmental Working Group on the Treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System (1998), p 29. The person to whom the fear attaches should be limited to the witness himself and his immediate family. In the event that a witness claiming to be in fear cannot be assuaged by the use of special measures, the court should proceed extremely cautiously when assessing objectively the reasonableness of his fear; in carrying out that test the F G H

A primary question is what is the consequence which the witness fears will result from giving live evidence against the particular defendant. Parliament, although providing that fear is to be construed widely, also provided limited guidance that the feared consequences must be serious: death, injury or financial loss (see section 116(3) of the 2003 Act) and provided greater stringency in section 4(6) of the Criminal Justice (Witness Anonymity) Act 2008 where the feared consequences of death and/or serious injury and/or
B serious danger to property must be shown before the court can properly allow the witness's statement to be read: see *R v Davis* [2008] AC 1128; *R v Mayers* [2009] 1 WLR 1915 and *R v Powar* [2009] 2 Cr App R 120.

Although evidence will not be admitted where the party seeking to adduce it has put the maker in fear to prevent the evidence being given, section 116(5) of the 2003 Act does not cover the situation where those
C acting in authority, such as the police, unintentionally put a witness in fear by giving information which has the effect of deterring him from giving live evidence. The duty of care on those responsible for the welfare of witnesses requires self-regulation to ensure that they do not encourage witnesses to give statements on a "guarantee" that they will not in the event be required to give evidence. Disclosure to witnesses by the police of background material about the defendant and his associates should be discouraged.
D Unless it is checked, there is the possibility of abuse by officers, either deliberately, accidentally or negligently.

Since the convictions were based to a decisive degree on the statement of an absent witness who was essential to the Crown's case, the court should have concluded that the defendants' inability to challenge her credibility on the central issues in the case rendered their trial unfair.

E *David Perry QC* and *Louis Mably* (instructed by *Crown Prosecution Service, Headquarters*) for the Crown.

Before enactment of the Criminal Justice Act 2003 the hearsay rule in criminal proceedings was subject to numerous exceptions, technicalities and contradictions which made it difficult to interpret in practice and harder still to justify in principle: see *Myers v Director of Public Prosecutions* [1965]
F AC 1001; Law Commission Report on *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997) (Law Com 245) (Cm 3670) and Law Commission Consultation Paper No 138 (1995) on *Evidence in Criminal Proceedings: Hearsay and Related Topics*. The statutory scheme of the 2003 Act made provision for the admissibility of hearsay evidence in criminal proceedings (see sections 114–120) and also provided general safeguards for the party against whom hearsay evidence was adduced: see
G sections 121–126.

Section 116 makes hearsay evidence automatically admissible where the maker of the statement is dead, unfit, outside the United Kingdom or cannot be found; admissibility does not depend on the exercise of a judicial discretion save that sections 123–126 give the court an exclusionary discretion in particular circumstances, as does section 78 of the Police and
H Criminal Evidence Act 1984 and the common law. However, in the case of a witness in fear a previous hearsay statement is only admissible with permission of the court. A statement admitted under section 116 is the only, and therefore the best, evidence from its maker. If it is not admitted the court will be deprived of the maker's evidence in its entirety, no matter how important or reliable it is. While an accused cannot test the accuracy of the

statement by cross-examination, the statutory scheme and the trial process provide important counterbalancing safeguards: see sections 116(1)(b)(2) and 123–126.

Section 116 is to be contrasted with its predecessor, section 23 of the Criminal Justice Act 1988, which provided a more restrictive approach; but both Acts provided a scheme for admissibility which required careful and structured decision-making and provided significant safeguards in recognition of the potential weaknesses and dangers of hearsay.

Parliament, in enacting the 2003 Act, accepted the Law Commission's conclusion that the Convention for the Protection of Human Rights and Fundamental Freedoms, in guaranteeing the principle of a fair trial in article 6, did not require supporting evidence where a particular element of an offence was proved by hearsay and that adequate protection for the accused would be provided by the safeguards in the scheme. As so enacted the scheme expressly acknowledges that a conviction may be based wholly on hearsay evidence: see section 125.

The domestic court has adopted an approach that (1) while a strong preference exists for calling evidence from live witnesses who are available for cross-examination by the defence, the focus of the inquiry in any given case is on whether any deviation from the strict letter of article 6(3)(d) has operated unfairly to the defendant in the context of the proceedings as a whole; (2) in considering that overall fairness it is necessary to have regard to the extent to which the legitimate interests of the defence have been safeguarded; and (3) properly applied, the statutory scheme will not lead to unfairness and a conviction based solely, or mainly or decisively on hearsay evidence will not necessarily be unsafe: see *R v M (KJ)* [2003] 2 Cr App R 322; *R v Sellick* [2005] 1 WLR 3257, paras 46, 49–51, 56–57; *R v Al-Khawaja* [2006] 1 WLR 1078, para 26; *R v Tahery (Alireza)* [2006] EWCA Crim 529; *R v Cole* [2007] 1 WLR 2716, paras 14, 20; *R v Mayers* [2009] 1 WLR 1915 and *Grant v The Queen* [2007] 1 AC 1.

In finding a violation of article 6(3) the European Court of Human Rights, in *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1, relying on its previous decision in *Lucà v Italy* 36 EHRR 807, did not accept the approach of the domestic court. The European Court of Human Rights relied on the *Lucà* case as establishing a sole or decisive rule in the case of untested evidence from an absent witness. But the case law of the European Court of Human Rights does not support the existence of such an inflexible rule in the case of an absent *identified* witness. In the case of absent, *unidentified*, witnesses, the rule is readily understandable. But where the absent witness is known, such a rule is arbitrary, technical and inflexible.

In the case of an absent, identified witness that rule is unsatisfactory as a matter of principle. It has the result of making the importance of the evidence the determinative, and only, factor in any assessment of admissibility. Its mechanical and uniform application would lead to the exclusion of cogent and reliable evidence against a defendant and, in the context of the scheme enacted in the 2003 Act, is retrograde. The words "sole or decisive" are not defined by the European Court of Human Rights and their use would cause significant practical difficulties in English criminal proceedings. The European court's judgment creates the paradoxical situation that the more ruthless the criminal is in keeping the witness away the more likely the rule will operate in his favour. The court appears to ignore the interests of

witnesses and victims which are protected under the Convention and are recognised in its earlier case law. The court attached little or no weight to the domestic court's approach that the fairness of the proceedings is to be judged overall. That is inconsistent with its jurisprudence that it should not substitute its own judgment for that of the national court: see *Edwards v United Kingdom* (1992) 15 EHRR 417, para 34.

The European Court of Human Rights has considered two distinct situations in its case law: first, anonymous witnesses, sometimes present, sometimes absent; and, secondly, absent identified witnesses. Originally the sole or decisive test was applied in relation to the first, but not to the second situation. A general statement of the test in the case of anonymous witnesses was first made in *Doorson v The Netherlands* 22 EHRR 330. Prior to that decision the court had considered a number of cases involving anonymous witnesses, absent witnesses and witnesses whose evidence had not been tested for other reasons: see *Unterpertinger v Austria* 13 EHRR 175; *Bricmont v Belgium* 12 EHRR 217; *Kostovski v The Netherlands* 12 EHRR 434; *Windisch v Austria* 13 EHRR 281; *Delta v France* 16 EHRR 574; *Asch v Austria* 15 EHRR 597; *Lüdi v Switzerland* 15 EHRR 173; *Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A; *Saïdi v France* 17 EHRR 251 and *Isgrò v Italy* 19 February 1991, Publications of the European Court of Human Rights, Series A no 194-A, p 12.

The observation in *Doorson v The Netherlands* 22 EHRR 330, para 76 that even where there are sufficient counterbalancing procedures "a conviction should not be based either solely or to a decisive extent on anonymous statements" appeared to suggest that the court was merely repeating statements made in earlier decisions. However, no such general rule is to be found either explicitly or implicitly in the earlier case law. But the statement was treated as a principle of general application in subsequent cases: see *Ferrantelli and Santangelo v Italy* 23 EHRR 288; *Van Mechelen v The Netherlands* 25 EHRR 647; *Trivedi v United Kingdom* 89-A DR 136; *AM v Italy* Reports of Judgments and Decisions 1999-IX, p 45; *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597; *Lucà v Italy* 36 EHRR 807; *Sadak v Turkey* (2001) 36 EHRR 431; *Craxi v Italy* (Application No 34896/97) (unreported) given 5 December 2002; *PS v Germany* 36 EHRR 1139; *Visser v The Netherlands* given 14 February 2002; *Birutis v Lithuania* (Application Nos 47698/99 and 48115/90) given 28 March 2002; *SN v Sweden* 39 EHRR 304; *Krasniki v Czech Republic* given 28 February 2006; *Taxquet v Belgium* (Application No 926/05) (unreported) given 13 January 2009 and *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1.

On analysis the Strasbourg case law establishes that (1) the admissibility of evidence is primarily a matter for regulation by national law and, as a general rule, it is for the domestic court to assess the evidence before it; the task of the European Court of Human Rights is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but to ascertain whether the proceedings as a whole, including the way the evidence was taken, were fair; (2) "witness" has an autonomous meaning for article 6 purposes; (3) witnesses have rights under the Convention and member states should adopt procedures which take account of their interests; (4) as a general rule evidence must be produced at a public hearing,

in the presence of the accused, with a view to adversarial argument, as required by article 6(3)(d); (5) that rule is not absolute and circumstances may justify departure from it to allow evidence to be received from an anonymous or absent witness; (6) reasons for such departure must be carefully examined and justified; and (7) where there is such a departure, the rights of the accused must be adequately safeguarded.

If the decision in *Al-Khawaja and Tahery v United Kingdom* is correct, there is a further principle that a conviction based solely or to a decisive extent on the untested statement of an absent witness is almost invariably a violation of article 6(1)(3)(d) taken together, save where the defendant himself is responsible for the absence of the witness.

Detailed examination of the cases shows that while the European Court of Human Rights originally developed the rule out of the anonymous witness cases, even in those cases there were often other reasons for finding a violation. The European Court of Human Rights has not explained with precision what amounts to sole or decisive evidence in a particular case. The test is not to be found in the wording of article 6(3)(d); neither word is defined in the European court's decisions; it is impossible to discern a consistent approach and its conclusions are sometimes difficult to justify: see *Doorson v The Netherlands* 22 EHRR 330. The evidence has often been multiple hearsay, or of a type which is not admissible in English criminal proceedings. The case law is not always easy to follow or interpret; in some instances the principles derived from the absent anonymous witness cases are imported into the cases concerning absent identified witnesses without explanation or detailed reasoning. In other cases (see *Kok v The Netherlands* and *Krasniki v Czech Republic*) the important question appears to be whether the proceedings as a whole are fair. The approach can therefore be interpreted as being flexible, the question of whether evidence is decisive is simply one factor to be taken into account when deciding whether the proceedings were fair. The more flexible approach is inevitable once it is accepted that there is no absolute rule requiring witnesses to give evidence in person.

It is significant that Parliament's response to *R v Davis* [2008] AC 1128 was to enact the Criminal Evidence (Witness Anonymity) Act 2008 where, by section 5(2), the question whether anonymous evidence might be sole or decisive is simply one of a number of factors which the court must take into account when deciding whether to make an anonymity order; and that none of the factors outweighs any of the others: see *R v Mayers* [2009] 1 WLR 1915, para 19.

In the case of identified witnesses, prior to *Al-Khawaja and Tahery v United Kingdom*, the same lack of consistency and clarity existed: see *AM v Italy* Reports of Judgments and Decisions 1999-IX, p 45; *Lucà v Italy* 36 EHRR 807 and *Taxquet v Belgium* given 13 January 2009; and contrast *Unterpertinger v Austria* 13 EHRR 175; *Van Mechelen v The Netherlands* and *Saïdi v France* 17 EHRR 251.

The Court of Appeal was correct to conclude that there neither was nor should be a rule that counterbalancing measures could never be sufficient where evidence was sole or decisive. The carefully structured scheme of the 2003 Act is compatible with the rights of an accused under the Convention, without resort to the encumbrance of an inflexible sole or decisive rule. First, the Act provides for the admission of evidence from the absent witness only where there is good reason for the witness's absence: see section 116.

A threshold condition for admissibility is that the witness is necessarily unable to give evidence in person. Secondly, the Act requires the court to conduct an examination as to why the admission of evidence is said to be justified, and to be satisfied that justification is made out. Thirdly, where a witness is absent through fear, evidence is only admissible if the court is satisfied that the statement ought to be admitted in the interests of justice. The court is required to consider the risk of unfairness, the possibility of special measures and any other relevant matters when reaching its conclusion on what the interests of justice demand. Fourthly, as a general rule, the evidence will be limited to first-hand hearsay, and where that is not so, a further threshold condition must be satisfied, based on the reliability of the statement: see section 121(1)(c). Fifthly, the Act and the trial process contain a number of safeguards for the party against whom the evidence is admitted; they include the court's power to exclude unreliable evidence or evidence which it is unfair to admit; the opportunity to challenge the reliability of the evidence and the credibility of the maker of the statement; the power of the trial judge to stop the case if the evidence is unconvincing; the trial judge's obligation to direct the jury carefully on the special need for caution where evidence has not been the subject of cross-examination.

Imposition of the sole or decisive rule on the scheme of the 2003 Act is therefore unnecessary but, in any event, it would give rise to a number of principled objections. In particular, it would introduce a new requirement for corroboration in place of the much welcomed abolition of the complex and outdated corroboration rules formerly existing in domestic law. The rule would also see the return of an arbitrary approach which brought the hearsay rule into disrepute and which the 2003 Act was intended to sweep away. The sole or decisive rule is predicated on the false assumption that all critical hearsay is unreliable or, in the absence of cross-examination, incapable of proper assessment. It would also exclude evidence simply because it was important. That would result in the exclusion of cogent and reliable evidence against an accused for no good or coherent reason: see *R v Adams* [2008] 4 All ER 574; *R v Hovell* [1987] 1 NZLR 610 and *Scott v The Queen* [1989] AC 1242. A sole or decisive rule would also be difficult to apply in English proceedings, not least, because the Crown Court judge would have to apply it at the outset of a trial when considering whether to admit the evidence. That would place him in an impossible situation, requiring him to assess prospectively the decisiveness of evidence which might not be apparent until the end of the case. It is unsatisfactory as a matter of principle and would undermine the practical and effective operation of the statutory scheme in the 2003 Act: see *R v Arnold* [2005] Crim LR 56; *R v Mayers* [2009] 1 WLR 1915 and *Al-Khawaja and Tahery v United Kingdom* 49 EHRR 1.

In contrast to the United States of America (see *Crawford v Washington* 124 S Ct 1354), the approach of other common law jurisdictions is not to impose a strict exclusionary rule: see *R v Smith* [1992] 2 SCR 915; *R v Rockey* [1996] 3 SCR 829; *R v Khan* [1990] 2 SCR 531; *Scott v The Queen* [1989] AC 1242; *R v Hovell* [1987] 1 NZLR 610; *R v Manase* [2001] 2 NZLR 197; *R v Baker* [1989] 1 NZLR 738 and the Australian Evidence Act 1995 (Commonwealth), section 65(2)(c).

*Owen QC* replied.

The Committee took time for consideration.

On 1 October 2009 the jurisdiction of the House of Lords was transferred to the Supreme Court of the United Kingdom pursuant to Part 3 of the Constitutional Reform Act 2005.

9 December 2009. **LORD PHILLIPS OF WORTH MATRAVERS PSC** 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 for the Protection of Human Rights and Fundamental Freedoms ("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)(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)(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 . . . (d) to examine or have examined witnesses against

A 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
B "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
C 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
D took as its starting point the following statement in *Lucà v Italy* (2001) 36 EHRR 807, para 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
E 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
F 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.
G Article 43(2) provides that a panel of five 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
H 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)* [2010] 2 AC 269 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 the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic 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 the domestic 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 the domestic 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 textbooks 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

A 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.

B **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 C 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 D 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 E 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 F 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 G 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 H 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 para 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 paras 11–16 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: sections 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: sections 114(1)(a)(c), 116 to 117, 119 to 120 and 127 to 129. (iii) It provides for a limited residual power to admit hearsay if the interests of justice require it: section 114(1)(d) and 114(2). (iv) It establishes special stipulations to which hearsay evidence is subject: sections 121 to 126.

**32** Among the provisions of Part 11, Chapter 2 of the CJA 2003 in the second group are the following: (i) by section 116(1)(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 section 116(1)(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 section 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 section 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 (section 116(1)(a)); and (ii) the witness must be identified to the satisfaction of the court: section 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 section 117 or, where a machine is involved, section 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 (section 117(2)), and the court is not to admit them if there is doubt about their reliability: sections 117(6)(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 (section 117(5)): that is designed to ensure that if he can attend to give first-hand evidence he does so. Section 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. Section 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) Section 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 section 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) Section 126 preserves the general power of the judge (which existed at common law and is enshrined in section 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 Law 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 Law 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

A 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 paras 77–78, the CJA 2003 has
B 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 p 560,
C para 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.

D *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
E prosecution case. An analysis of the position in those jurisdictions, prepared by Lord Mance, is annexed to this judgment as Annex 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
F 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.

G *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:

H

> "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." A

**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* (2004) 124 S Ct 1354 reversing its previous decision in *Ohio v Roberts* (1980) 100 S Ct 2531 and in *Melendez-Diaz v Massachusetts* (unreported) 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. B

**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). C D

**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. E F

*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. G

**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 H

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] 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 para 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 para 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 para 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.

A "(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 B 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:

C "(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; D (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, E 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 F 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.

G *Criminal procedure in the civil law jurisdictions*

**57** In *R (D) v Camberwell Green Youth Court* [2005] 1 WLR 393, paras 10 and 11, Lord Rodger of Earlsferry stated:

"10. . . . the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused.

H "11. 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 préparatoires 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 50 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 Federal Republic of 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* [2007] 1 AC 1, para 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] 1 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 para 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* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, p 10.

**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, at para 70:

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

**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.

A 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* 22 EHRR 330, para 71; *Kok v The Netherlands* Reports of Judgments and Decisions 2000-VI, p 597; *Visser v The Netherlands* (Application No 26668/95) given 14 February B 2002, para 47; *Krasniki v Czech Republic* (Application No 51277/99) given 28 February 2006, paras 80–81; *Lucà v Italy* 36 EHRR 807, para 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 C 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 D 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* 22 EHRR 330 is a particularly informative example of the approach of the Strasbourg court to a situation E 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 F 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 G 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: para 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": para 80. H

**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": para 32. The court concluded, at para 75, 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, at para 39:

> "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, at para 41:

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

witness was making his statement or at some later stage of the proceedings."

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 para 43. The aim is "adversarial argument" at a "public hearing": see *Kostovski*, at para 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* 36 EHRR 807.

*The sole or decisive rule*

76 The sole or decisive rule entered the Strasbourg jurisprudence in *Doorson v The Netherlands* 22 EHRR 330 where, having found justification for admitting the statement of an absent witness and for the anonymity of two witnesses, the court added, at para 76: "Finally, it should be recalled that, even when 'counterbalancing' procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements."

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 Annex 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* [2007] 1 AC 1 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] 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, at paras 50–53:

> "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

A 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 B 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 C 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 D 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 E 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 F 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 G 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."

H In *R v Davis* [2008] AC 1128 Lord Mance analysed the Strasbourg jurisprudence in relation to anonymous witnesses and summarised his conclusions as follows, at para 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 Annex 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 34896/97) (unreported), given 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 926/05) (unreported) given 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* (1991) 15 EHRR 597 and *Artner v Austria* 28 August 1992, Publications of the European Court of Human Rights, Series A no 242-A, p 10.

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 article 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, at para 80, 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)(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 Annex 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, para 10 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* 49 EHRR 1, para 39 the court relied, as indicating that a statement was decisive, on the statement of the Court of Appeal in *R v Tahery (Alireza)* [2006] EWCA Crim 529 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 paras 68–70. 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* (2007) 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

A 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 B 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 C 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)(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 D 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 E 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 F this judgment as Annex 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)(3)(d) in a case where there had been justification for not calling a witness and where the evidence was demonstrably reliable. G 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*

H **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: *R v Al-Khawaja* [2006] 1 WLR 1078; *R v Tahery (Alireza)* [2006] EWCA Crim 529. 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, at para 34:

> "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) given 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* (1988) 11 EHRR 360, 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 para 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* (1986) 13 EHRR 175 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-Khawaja*. At para 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)(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

A at a later stage, their admission in evidence will not in itself contravene article 6(1)(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 B 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 C 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 D 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 para 37 of its judgment:

E

"The court notes that in the present cases the Government, relying on the Court of Appeal's judgment in *Sellick* (see para 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 F 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 G 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."

H

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": para 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)(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: para 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)(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.

*Annex 1 (prepared by Lord Mance): see para 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), vol 3, para 1420. 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 *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 section 59(1) is that hearsay evidence is generally excluded:

> "(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.

A "(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 B 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 C 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 D 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. Section 3 enabled the admission of out of court statements E 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). Section 18 gave the trial judge a discretion to exclude any such statement from the jury, and section 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 F 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 G appeal, it was submitted that it should have been excluded under section 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 H "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, at paras 30–31:

> "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.

A "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 B drawings to qualify them for admission as hearsay. The appeal was therefore allowed.

*Annex 2: see para 77*

1 In *Unterpertinger v Austria* (1986) 13 EHRR 175, para 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 C "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, para 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 D 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 para 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": E para 44.

4 In *Windisch v Austria* (1990) 13 EHRR 281, para 31 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 F because of fear of reprisals.

5 In *Delta v France* (1990) 16 EHRR 574, para 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.

G 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.

H 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)(3)(d) because the conviction had not been based to a decisive extent on the agent's evidence. The court observed at para 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)(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.

*Annex 3: see para 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 para 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) (unreported) given 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)(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* Reports of Judgments and Decisions 2000-VI, p 597 the court found the applicant's complaint of a violation of article 6(1)(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:

> "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* (2001) 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) (unreported) given 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 v Lithuania* (Applications Nos 47698/99 and 48115/99) (unreported) given 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—para 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) (unreported) given 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*: para 79.

9 In *Taxquet v Belgium* (Application No 926/05) (unreported) given 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).

*Annex 4 (prepared by Lord Judge CJ): see para 93*

1 In this annex 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 of Lords 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.

*Contents*

| Case | Reference | Category of witness | Paragraph |
|---|---|---|---|
| *Unterpertinger v Austria* | (1986) 13 EHRR 175 | Absent, identified | 2 |
| *Bricmont v Belgium* | (1989) 12 EHRR 217 | Absent, identified | 6 |
| *Kostovski v The Netherlands* | (1989) 12 EHRR 434 | Absent, anonymous | 10 |
| *Windisch v Austria* | (1990) 13 EHRR 281 | Absent, anonymous | 14 |
| *Delta v France* | (1990) 16 EHRR 574 | Absent, identified | 17 |
| *Lüdi v Switzerland* | (1992) 15 EHRR 173 | Absent, anonymous | 21 |
| *Saïdi v France* | (1993) 17 EHRR 251 | Absent, identified | 26 |
| *Doorson v The Netherlands* | (1996) 22 EHRR 330 | Combination | 31 |
| *Ferrantelli and Santangelo v Italy* | (1996) 23 EHRR 288 | Absent, identified | 41 |
| *Van Mechelen v The Netherlands* | (1997) 25 EHRR 647 | Anonymous "present" | 46 |
| *AM v Italy* | (1999) Reports of Judgments and Decisions 1999-IX, p 45 | Absent identified | 55 |
| *Lucà v Italy* | (2001) 36 EHRR 807 | Absent identified | 60 |
| *PS v Germany* | (2001) 36 EHRR 1139 | Absent Identified | 65 |
| *Visser v The Netherlands* | (2002) (Application No 26668/95) | Anonymous, present in part | 70 |

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| *Taxquet v Belgium* | (2009) (Application No 926/05) | Absent, anonymous | 91 |

*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 stepdaughter 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 stepdaughter 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 stepdaughter 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 stepdaughter. 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 stepdaughter 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 it, at para 32 "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)(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 (1989) 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 two 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 paras 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* [2009] 1 WLR 1915, 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 rewrite 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 hearings", 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 para 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.

*Lüdi 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 para 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 *R v 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 WLR 1915, 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, at para 46, 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

A 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
B 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.

C *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.

D 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
E 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
F 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.
G 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.

H 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)(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, at para 83:

> "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 para 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

A 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
B 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
C 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.

D *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
E 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.
F In practice therefore the outcome of this case would have coincided with the decision of the commission rather than the ECtHR itself.

*Van Mechelen 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
G 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)(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"
H 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, at 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, at 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 (paras 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* which states, under the section titled *Considering whether to make an application*:

> "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,

A 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 para 13: the evidence would not be admissible.

*AM v Italy, Reports of Judgments and Decisions 1999-IX, p 45*

55 The applicant was convicted of sexually assaulting G during a school
B 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
C 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
D 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
E 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
F 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
G 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
H 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, at apra 44, 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)(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 eight-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, at para 31, 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)(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) (unreported) given 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, at 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 para 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 v Lithuania (Applications Nos 47698/99 and 48115/99) (unreported) given 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 paras 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 para 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 para 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 v Turkey (2001) 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, at para 65, 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) given 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)(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 para 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) given 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 para 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 OF EATON-UNDER-HEYWOOD JSC**

**112** I am in full agreement with the judgment of Lord Phillips of Worth Matravers PSC. 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 (paras 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* 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)* [2010] 2 AC 269 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 PSC, 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 PSC 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.

*Appeals dismissed.*

D E C P