



carmelite  
chambers

## WINTER LECTURE SERIES

### WITNESS PROTECTION

**ANONYMOUS, VOICE DISGUISED, NO  
QUESTIONS ALLOWED THAT MAY LEAD TO  
IDENTITY, FROM BEHIND A SCREEN OR IN  
ANOTHER ROOM..... WITNESS PROTECTION  
MEASURES INCREASE BUT IS JUSTICE  
IMPROVED?**

**[2 CPD POINTS]  
[CPD REFERENCE – CDB/CORF]**

**WEDNESDAY 15<sup>TH</sup> OCTOBER 2008  
REGISTRATION 6.00PM  
LECTURE WILL COMMENCE AT 6.30PM**

**Venue: ARUNDEL HOUSE  
13-15 Arundel Street  
Temple Place  
London  
WC2R 3DX**

**Chair: Nigel Lambert QC**

**Speakers: James Tilbury & Lee Halliday-Davis**

**WITNESS PROTECTION MEASURES INCREASE...**  
**BUT IS JUSTICE IMPROVED?**

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2. **R v Aston Bola [transcript 18<sup>th</sup> June 2003]**
3. **R v Davies [2008] UKHL 36**
4. **Liberty Briefing Document [July 2008]**
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6. **Joint Committee on Human Rights-Minutes of Evidence [8<sup>th</sup> July 2008]**
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**LEE HALLIDAY-DAVIS  
JAMES TILBURY  
CARMELITE CHAMBERS  
OCTOBER 2008**

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# The Director's Guidance on Witness Anonymity

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## Introduction

The Criminal Evidence (Witness Anonymity) Act 2008 ("the 2008 Act"), which came into force on 21 July 2008, abolishes the common law rules relating to witness anonymity and provides a statutory framework in their place.

This Guidance must be read in conjunction with the Attorney General's Guidelines on *The Prosecutor's Role in Applications for Witness Anonymity Orders*. The Guidelines and this Guidance set out how Crown Prosecutors must deal with applications for anonymity under the 2008 Act, and associated matters.

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## General principles

The overarching principle of criminal justice is that the defendant must receive a fair trial. The prosecution has a vital role to play in delivering fair trials. Where the prosecution can only present its case in a way which denies the defendant's right to a fair trial, it is under a duty to stop the case, no matter how serious the allegation may be.

There is a long-established principle that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial is entitled to be confronted by his accuser in court.

In *R v Davis (2008) UKHL 36*, the House of Lords ruled that, on the facts of that case, the measures used (full anonymity, screens, voice distortion, and use of pseudonyms) rendered the trial unfair under Article 6 ECHR. This was because the cumulative effect of the measures inhibited the defence's ability fully to test the credibility of the prosecution's three main witnesses. Following the Davis ruling, the Criminal Evidence (Witness Anonymity) Act 2008 came into force.

An application for a witness anonymity order should only be made when, after full consideration of all the available alternatives, a clear view is taken that section 4(2) of the 2008 Act applies.

Chief Crown Prosecutors must ensure that arrangements are in place with police forces so that the CPS has the earliest notification of any case or investigation in which witness anonymity may be sought.

It is not possible to set down guidance that will cover every eventuality. Some cases may be at an early stage of investigation; in others, the question of anonymity may first come to the attention of the Crown Prosecutor after charge. Crown Prosecutors must apply the following guidance in a way that does not inhibit the effective progress of the case, while ensuring that proper consideration is given to the questions of anonymity at the most appropriate time.

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## Information required when considering whether an order is needed

In any case where the question of witness anonymity arises, the Crown Prosecutor must first consider whether it is possible to secure corroborative evidence of what the witness will say, and whether this is sufficient to allow the case to continue without the witness's evidence. Where it is decided that the witness remains essential to the prosecution case, the Crown Prosecutor must ensure that the police have obtained as much corroborative evidence as possible, so that, if possible, the evidence of the witness is not the sole or decisive evidence on which the prosecution intends to rely.

If an anonymity order may be sought, the Crown Prosecutor must ensure that the police provide the following information in writing:

1. a Superintendent's request for a witness anonymity application on behalf of a named prosecution witness;
2. **either:**
  - a. a full evidential statement from the witness giving their true identity; **or**
  - b. where that person is a police officer or a member of any other agency responsible for the investigation of criminal offences, a report from the Superintendent setting out why it is appropriate for the Crown Prosecutor to apply to the court to exercise its discretion under section 3(2)(a) not to be informed of the identity of the witness;
3. a redacted version of the witness's full evidential statement with all elements that could identify the witness removed;
4. a statement from the witness setting out their fear about giving evidence if their identity is made known to the defendant;
5. a report which includes:
  - o a full risk assessment undertaken by the police (complying with *Osman v UK (2000) 29 EHRR 345*), which should include an assessment of the reasonableness of the witness's fear and explaining why any protection measures are not adequate;
  - o a consideration of special measures and the reasons why a special measure, or a combination of special measures, would not be adequate to deal with the risk identified;
  - o an indication whether any special arrangements

have been made with the witness (for example, a house move);

- o the background of the witness, including previous convictions, any other bad character evidence and details of their involvement in any previous case where the police know that their evidence may not have been believed;
- o whether the police are aware of any relationship between the witness and the defendant and any associates of the defendant;
- o whether the police have any reason to believe that the witness may not provide truthful evidence to the court.

In coming to a decision, the Crown Prosecutor must first evaluate the reasonableness of the fear of the witness. The fear may be connected to a specific incident (such as a threat made to the witness), or it may be based on a general climate of fear in the environment in which the witness lives. In either case, it is essential that the Crown Prosecutor is satisfied that the police have evidence to support the concerns of the witness.

Once the Crown Prosecutor is satisfied that the fear of the witness is reasonable, they must consider whether any statutory special measures or protective measures available to the police would address the fear of the witness. These include:

1. applying to have the statement of the witness read (section 116 Criminal Justice Act 2003);
2. applying for one of the measures provided by the Youth Justice and Criminal Evidence Act 1999 for intimidated witnesses - screening the witness from the accused; evidence by live link; evidence given in private;
3. applying for reporting restrictions (section 46 YJCEA 1999);
4. any safeguards that the police could provide, including any witness protection scheme.

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**Special provisions for police officers or members of any other agency responsible for the investigation of criminal offences**

In any case involving a witness who is a member of the public, the police must provide an unredacted statement providing the true identity of the witness in respect of whom an application is sought.

However, in a case involving a witness who is a police officer or a member of any other agency responsible for the investigation of criminal offences, the position may be different. Although the general principle that the Crown Prosecutor should be made aware of the true identity of the witness should be followed wherever possible, there may be occasions when the agency considers that it is appropriate for the court to exercise its discretion under section 3(2)(a) and not be informed of the identity of the witness.

Where the Superintendent is satisfied that the prosecution should be invited to make such an application to the court, he should make a report to that effect to the Crown Prosecutor. In such instances, the police need not supply a full evidential statement from the witness giving their true identity at this stage.

The Crown Prosecutor must consider such a request together with all the other material supplied in accordance with paragraph 10 of this Guidance. The Crown Prosecutor should follow paragraphs 24 - 35 of the Guidance which sets out the process for considering whether to make an application.

If the Crown Prosecutor is satisfied that it is appropriate to apply for a witness anonymity order and to invite the court not to require the identity of the witness to be supplied to it, the Crown Prosecutor should follow paragraphs 39 - 46 of the Guidance but also invite the court to exercise its discretion under section 3(2)(a) not to require it to be informed of the true identity of the witness concerned.

If the Crown Prosecutor is satisfied that it is appropriate to apply for a witness anonymity order but on the basis that the court should be informed of the true identity of the witness concerned, they should discuss this aspect of the application with the Superintendent. If agreement is reached on that basis, the true identity of the witness should be revealed to the Crown Prosecutor in a form that is agreed. The application to the court may then be made in accordance with section 3(2) and the identity of the witness should be revealed to the court in the form determined by the court.

If agreement with the Superintendent is not reached

about the way forward, the matter should be referred to the Head of the Complex Casework Unit or the Head of HQ Casework Division in accordance with paragraph 36 of the Guidance.

It is a matter for the court to decide whether to grant the order and whether it shall be informed of the identity of the witness.

Where the court decides that it must be informed of the identity of the witness, the Crown Prosecutor and the relevant agency must decide whether they are willing to comply with that part of the court's order.

Where the Crown Prosecutor and the agency decide that it would not be in the public interest for the identity of the witness to be given to the court, the application of a witness anonymity order should be withdrawn.

Where the Crown Prosecutor and the agency decide that it is appropriate to inform the court of the identity of the witness, both the court and the prosecutor should be informed.

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## Considering whether to make an application

Section 4 of the 2008 Act sets out the conditions (A - C) that must be met before the court will make a witness anonymity order. Accordingly, prosecutors must be sure that they have sufficient evidence or information to satisfy these conditions. 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.

Section 5 of the Act sets out some relevant considerations for the court to take into account in deciding whether to make a witness anonymity order. Prosecutors should have particular regard to sections 5 (2)(b), (c) and (d) which deal with the credibility of the witness; whether the evidence of that witness is the sole or decisive evidence in the case; and whether there is reason to believe that the witness has a tendency, or motive, to be dishonest.

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## The distinction between credibility and reliability

A key issue for the Crown Prosecutor centres on the distinction between the witness's credibility and their reliability.

In many instances, the only issue for the defence will be the reliability of the witness and the accuracy of their evidence. Here, it may be less critical to know the identity of the witness.

This may be the case where the witness is a police officer acting undercover, or a civilian witness of good character, who does not have any connection to the defendant.

In other cases, for example where the witness may be involved in criminal activity or knows the defendant, and particularly where there may be some criminal association between them, the credibility of the witness may be substantially in issue. Crown Prosecutors will have considered any issues surrounding the credibility of the witness when they received the various reports referred to in paragraph 10 of this Guidance. But at this stage of the process it is essential that the issue is reconsidered in the light of section 5(2) of the 2008 Act.

Where it is clear that the credibility of the witness may be in issue, the Crown Prosecutor must consider the relative importance of the witness's evidence to the prosecution case. Where it remains the sole or decisive evidence, it is unlikely that the defendant will be able effectively to cross-examine an anonymised witness.

However, each case must be decided on its own facts. Sometimes, even where credibility may be in issue, the prosecution will be able to provide sufficient material to the defence, short of identifying the witness, to allow an effective cross-examination to take place.

Crown Prosecutors must not allow cases to continue where they have genuine grounds for believing that the granting of a witness anonymity order would prevent the defendant from having a fair trial.

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## Level of authorisation within the CPS

Where a Crown Prosecutor is satisfied that it is appropriate to apply to the court for a witness

anonymity order, they must inform the Head of their Complex Casework Unit or Head of their HQ Casework Division. It is the responsibility of the Head of the Complex Casework Unit, or the Head of HQ Casework Division, to decide whether to authorise an application to the court for a witness anonymity order.

In the absence of the CCU Head, the 'owning' Chief Crown Prosecutor should be authorised to take the decision. Therefore, for those cases that meet the criteria for automatic submission to the CCU (that is, because of the type of case, irrespective of any application for witness anonymity orders), authorisation is delegated to the Chief Crown Prosecutor - Group Chair. For all other cases, authorisation is delegated to the Chief Crown Prosecutor for the Area where the case is being handled.

For HQ Casework Divisions, the nominated Deputy should be authorised to take the decision in the absence of the Head of Casework Division.

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## When the Crown Prosecutor decides not to make an application

Where a Crown Prosecutor decides that it is not appropriate to make an application, they must advise the police promptly. Where the police are not content with the decision, the Crown Prosecutor should notify the Head of the Complex Casework Unit or the Head of HQ Casework Division, so that the issue may be considered further.

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## Scope of the 2008 Act

The vast majority of applications are likely to occur in the Crown Court. However, Crown Prosecutors must bear in mind that such orders may be made in magistrates' courts, and particularly in the Youth Court where more serious offences are tried.

In cases that are triable either way, Crown Prosecutors will bear in mind that the need for an anonymous witness order is a consideration that may be placed before the court under section 19(3) Magistrates' Courts Act 1980 as a reason why Crown Court trial is more appropriate.

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## Making the application

An application for a prosecution witness anonymity order may only be made by a Crown Prosecutor or by counsel instructed on their behalf. Crown Prosecutors must ensure that counsel has the appropriate experience and is fully conversant with this Guidance.

Generally, the Crown Prosecutor should advise the court and the defence that the prosecution intends to apply for a witness anonymity order no later than the Plea and Case Management Hearing.

Sections 3(3) and (4) set out how the court should deal with any application. The court must give every party to the proceedings the opportunity to be heard on an application for a witness anonymity order, but it also has the power to hear from the prosecution in the absence of the defendant and his legal representative. More detailed guidance setting out the procedure to be followed is likely to be published in due course.

In making an application, the prosecutor must ensure that the court is provided with all material relevant to the application. This should include information about the decision-making process leading up to the application. The information listed at paragraph 10 should be supplied to the court as a matter of routine. Material will be relevant if the prosecutor relies upon it to support the application, or if it may tend to undermine or qualify the justification for making the order or for making it in the form sought by the prosecutor. The Crown Prosecutor must ensure that the court is addressed on each of the three conditions set down in section 4 of the 2008 Act and the court must be informed of the steps taken by the prosecution to try to secure the evidence of the witness short of anonymity.

At the inter-partes hearing, the defence will be able to make representations, but will not have sight of any sensitive material disclosed to the judge.

If they consider it necessary, judges may invite the Attorney General to appoint a Special Counsel to assist the court.

A request from the court for the appointment of a Special Counsel is made to the Attorney General's Office. Where the judge decides to seek Special Counsel, the Crown Prosecutor must promptly notify

their Complex Casework Unit Head, or HQ Casework Division Head, who will immediately inform Sue Patten by telephone [020 7271 2456] and/or by e-mail [[special.counsel@attorneygeneral.gsi.gov.uk](mailto:special.counsel@attorneygeneral.gsi.gov.uk)].

The Attorney General's Guidelines refer in greater detail to the role of the prosecutor when the court is considering whether to invite the Attorney to appoint Special Counsel. The Guidelines set out the duty of the prosecutor in ensuring that the Attorney is provided with all relevant material.

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## Successful applications

Where a witness anonymity order is granted, there is an absolute duty upon the prosecution to provide the defence with as much information as possible - commensurate with the granting of anonymity - to enable the defence effectively to cross-examine the anonymous witness. This particularly relates to material that might undermine the prosecution case or assist the defence.

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## Discharge or variation of a witness anonymity order

Any party may apply for a witness anonymity order to be varied or discharged if there has been a material change in circumstances. The court can also vary or discharge an order of its own initiative. If an order is varied or discharged, the prosecutor must notify the police and CCU Head or HQ Casework Division Head immediately.

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## Cases in trial when the 2008 Act comes into force

The 2008 Act contains measures to deal with cases where a witness order may have been made prior to the Act, relying on the court's inherent jurisdiction at common law: see section 10 of the Act.

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## Appeals

In relation to appeals, the Act provides that the Court must be satisfied that the order was consistent with the defendant receiving a fair trial. It further provides that the conviction must be quashed if the order was one which would not now be possible under the terms of the Act and, as a result of the order, the defendant did not receive a fair trial: see section 11 of the Act.

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## Maintaining records of applications

The CPS has undertaken to maintain a register of all cases in which an application for a witness anonymity order is made. That register must contain:

1. details of the case;
2. the nature of the witness in respect of whom a witness anonymity order was sought (civilian, undercover police officer; test purchase officer; other (to be specified));
3. on what grounds the order was sought;
4. details of any requested order that was not sought;
5. whether Special Counsel was sought by the court;
6. the outcome of the application and any reasons given by the court; and
7. the outcome of the case, and whether the case was stopped because an order was not granted.

Complex Casework Unit Heads and HQ Casework Division Heads are personally responsible for maintaining the register. The register is at [Annex A](#). An annotated version of the register to assist completion is at [Annex B](#).

The register should be updated during the life of the case and sent to Dan Jones [[dan.jones1@cps.gsi.gov.uk](mailto:dan.jones1@cps.gsi.gov.uk)] and Anne White [[anne.white@cps.gsi.gov.uk](mailto:anne.white@cps.gsi.gov.uk)] in Policy Directorate on the last working day of each month. The register will start with those cases currently on trial or awaiting trial in which an application has to be made under the 2008 Act in order to maintain any current anonymity order that has previously been granted. Complex Casework Unit Heads and HQ Casework Division Heads must

submit nil returns where appropriate.

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## Conclusion

The use of an anonymous witness should only be considered where it is justified under the 2008 Act and where such a course is consistent with a fair trial. Applications should be made only in those cases where it is absolutely necessary.

This guidance will be kept under review.

**KEN MACDONALD QC**  
**DIRECTOR OF PUBLIC PROSECUTIONS**  
**AUGUST 2008**

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# TAB 2

A

IN THE CROWN COURT  
AT NORTHAMPTON

T2002730

85-87 Lady's Lane,  
Northampton NN1 3HQ

18<sup>th</sup> June 2003.

B

Before:

MR. JUSTICE HUGHES

C

R B G I N A

D

-V-

E

ASTON BOLA

(Transcribed from tape by Marten Walsh Cherer Ltd., Midway House,  
27/29 Cursitor Street, London EC4A 1LT. Official Court Reporters).

F

MR. T. SPENCER, O.C., & MR. A. REYNOLDS appeared for the Prosecution.

MR. P. JOYCE, O.C., & MR. EVANS appeared for the Defence.

G

(IN CHAMBERS)

RULING ON P.I.I APPLICATION.

H

A  
18<sup>th</sup> June 2003.

(IN CHAMBERS)

RULING

B  
C  
MR. JUSTICE HUGHES: In the early hours of Saturday 9<sup>th</sup> November last year, as the customers at a club in the centre of Nottingham were leaving the premises, a woman called Tina Jacobs was approached behind in the street outside and shot at extremely close range in the back of the head. It was a summary execution.

D  
E  
It has many of the hallmarks of a drug related feud. The deceased was herself a drug dealer. There had been two quite possibly related shootings a few months earlier in July. This defendant himself had been shot and very nearly killed in the same club. He suffered serious gunshot wounds to the head and was saved by medical science. A close associate of the deceased called Thomas was, a few days after that, kidnapped and shot, it may well be by his own gun. Certainly there is evidence that it was the same gun as shot this defendant.

F  
This defendant is now charged with the murder of Tina Jacobs.

G  
H  
The Crown applies for a direction that the principal witness which it proposes to call shall be allowed to give evidence without revealing his identity. His witness statements have been served under the pseudonym "Joe Fish." The direction which is sought from me is a direction that there should be no obligation at any stage to reveal his identity. Secondly, that, in consequence, the Crown should be permitted to withhold not only primary evidence of his identity but any material from which his

