

be necessary in any event as even the Bill envisages that witness anonymity orders will not be available where such measures would be inconsistent 'with the defendant receiving a fair trial'.¹³

13. We are well aware that providing security for witnesses is expensive and providing relocation and subsequent new identities for witnesses is even more costly. In such circumstances, it is easy enough to understand how the prospect of giving evidence anonymously is far more attractive to both witnesses fearful of their safety and public servants mindful of their own limited resources. But the protection of witnesses cannot be done at the expense of basic fairness and it cannot be done on the cheap. Experience of other common law jurisdictions shows that effective witness protection can be achieved without compromising the principles of open justice.
14. Lastly, we think it necessary to answer the pernicious logic that, since some witnesses will only agree to give evidence anonymously, anonymous evidence is somehow necessary to bring dangerous criminals to justice. Whatever the fears of such witnesses, it is false to portray the issue of witness protection as a choice between protecting the lives of witnesses and protecting a person's right to a fair trial. We note for example that the United States, a far larger jurisdiction than the UK with a much higher rate of gun crime, manages to protect its witnesses without compromising the right to a fair trial. Indeed, the US Marshall Service which operates the federal witness protection programme boasts that it has never lost a witness.¹⁴ It may well be true that 'without witnesses, justice cannot be done',¹⁵ but it is certainly impossible to do justice by means of injustice, nor should we fall into the trap of thinking otherwise.

Clause 1 – New rules relating to the anonymity of witnesses

15. Clause 1 seeks to provide new rules governing anonymous witnesses. In particular, clause 1(2) abolishes the common law rules:

relating to the power of a court to make an order for securing that the identity of a witness in criminal proceedings is withheld from the defendant (or, on a defence application, from other defendants)

¹³ Clause 4(4) aka 'Condition B'.

¹⁴ United States Marshall Service, Witness Security Program: 'No program participant who follows security guidelines has ever been harmed while under the active protection of the Marshals Service' (<http://www.usmarshals.gov/witsec/index.html>).

¹⁵ Lord Mackenzie of Framwellgate, Hansard HL Debates, 15 December 1998 : Column 1276.

16. In our view, though, this is an unnecessary step and this is made clear by the confused and contradictory claims concerning the common law found in the explanatory notes to the Bill.

17. First, the notes describe the judgment of the House of Lords in *R v Davis* in the following terms:¹⁶

That appeal concerned the use of anonymous witness evidence at trial, which is governed by the common law. The effect of the judgment is to **restrict the courts' ability at common law to allow evidence to be given anonymously during criminal trials.**

18. Secondly, the explanatory notes to clause 1(2) state:¹⁷

The common law rules replaced by the Bill are **those which allow the court to make an order to secure that the identity of a witness is withheld from the defendant** or, in the case of defence applications, a another defendant.

19. If, however, the effect of the ruling in *R v Davis* was to eliminate the common law rules allowing anonymous witnesses, then – by definition – there are no common law rules to abolish.

20. In fact, the House of Lords did *not* decide that a court could never make an order granting a witness anonymity in criminal proceedings. It only decided that the court could not make an order for protective measures where those measures hamper, in the words of Lord Bingham, 'the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair'.¹⁸

21. In the circumstances, we see no need for the abolition of the common law in this area. There are many areas of the criminal justice system in which the common law and statute happily coexist and we think the issue of witness protection is too important to deprive any statutory provision of the enrichment which the common law would provide. In particular, we expect the principles identified by the judgment in *R v Davis* will prove a valuable guide to the courts below in determining in any particular case whether an anonymity order is compatible with a defendant's right to a fair trial.

¹⁶ Explanatory notes, para 18. Emphasis added.

¹⁷ *Ibid*, para 22. Emphasis added.

¹⁸ *Davis*, n 7 above, at para 35 per Lord Bingham.

Clause 4 – Conditions for making an order

Clause 5 – Relevant considerations

22. Clause 4(2) directs that a witness anonymity order may only be made where 3 conditions are met:

- (a) the measures are necessary to protect the safety of a witness, another person, 'to prevent serious damage to property',¹⁹ or 'real harm to the public interest';²⁰
- (b) having regard to all the circumstances, the taking of those measures would be consistent with the defendant receiving a fair trial; and
- (c) it is necessary to make the order in the interests of justice, because it appears to the court that (i) it is important that the witness testify and (ii) the witness would not testify if the order were not made.

23. Clause 5 sets out a list of considerations the court must have regard to when deciding whether the conditions in clause 4 have been met. These are:

- the 'general right' of a defendant in criminal proceedings to know the identity of a witness in the proceedings;
- the extent to which the credibility of the witness would be a relevant factor when the weight of his or her evidence comes to be assessed;
- whether the witnesses' evidence could be properly tested (whether on grounds of credibility or otherwise) without his evidence being disclosed;
- whether there is any reason to believe the witness has a tendency to be dishonest or any motive to be dishonest in the circumstances of the case; and
- whether it would be 'reasonably practicable' to protect the witness's identity by any other means other than by making an anonymity order.

¹⁹ Clause 4(3)(a).

²⁰ Clause 4(3)(b).

24. The considerations set out in clause 5 are closely modelled upon the terms of the New Zealand Evidence Act 2006. However, the New Zealand Act also provides that the court must have regard to:

- the principle that witness anonymity orders are justified **only in exceptional circumstances**;²¹
- the gravity of the offence;²² and
- whether there is other evidence that corroborates the witness's evidence.²³

25. Nor is there any requirement to the court to consider what has been identified as the central factor in determining the compatibility of anonymous evidence with Article 6(3)(d), i.e. whether, if anonymity were to be granted, any conviction would be based 'solely or to a decisive extent' upon the anonymous evidence.²⁴

26. While some of the conditions contained in clause 4 and the considerations in clause 5 are sound, some plainly are not.

27. First, the idea that a risk of 'serious damage to property' (clauses 4(3)(a) and 4(6)(b)) alone could justify the anonymity of a witness in criminal proceedings trivialises the urgency of the issue of witness protection. As Lord Mance noted in *R v Davis*,²⁵ the recommendations of the Committee of Ministers of the Council of Europe provide that.²⁶

Anonymity should only be granted when the competent judicial authority, after hearing the parties, finds that ... **the life or freedom of the person involved is seriously**

²¹ Section 112(5)(b) of the Evidence Act 2006 (NZ) (witness anonymity order for the purpose of High Court trial). Emphasis added.

²² Section 112(5)(c).

²³ Section 112(5)(f).

²⁴ See e.g. *Doorson v The Netherlands* (1996) 22 EHRR 330, para 76. See also the judgment of Lord Mance in *R v Davis*, n 7 above, and Ashworth, n 6 above, at 496: 'where the evidence is decisive, no amount of safeguards can cure the inherent unfairness'.

²⁵ *R v Davis*, n 7 above, para 79.

²⁶ Council of Europe Committee of Ministers, Recommendation No. R (97) 13, concerning the intimidation of witnesses and the rights of the defence, para 11. Emphasis added.

threatened or, in the case of an undercover agent, his/her potential to work in the future is seriously threatened.

28. Secondly, the reference to the 'public interest' in clause 4(3)(b) is hopelessly vague. If, as it seems likely, it is intended to cover undercover police officers who do not fear intimidation but rather the risk to their safety if identified, then this should be more narrowly drafted along the lines of the Committee of Ministers recommendation above.
29. Thirdly, the reference in clause 5(2) to the 'general right' of a defendant in criminal proceedings to know the identity of a witness in criminal proceedings seems to us incompatible with the clear terms of the common law and Article 6(3)(d) of the European Convention. To describe the right as 'general' wrongly suggests that it is open to qualification on a number of grounds. Compatibility with Article 6(3)(d) requires that the threshold be set much higher.
30. Fourthly, in both clause 4(5) and clause 5(2)(c), the court is required to consider the 'importance' of the evidence and 'whether it could be properly tested without his or her identity being disclosed' respectively. In the first case, this involves the court having to assess the weight of the evidence (something which, in most serious criminal cases will be the function of the jury). In the second, the court is being invited to speculate how a defendant may answer or cross-examine a witness without knowing their identity.
31. Fifth and lastly, the requirement to consider whether it would be 'reasonably practicable' (clause 5(2)(e)) to protect the witness by other means once again sets the bar much too low. All other things being equal, the fundamental right of a defendant to know the identity of his accusers cannot be offset simply because a public authority has deemed it would be too expensive to protect the witness via other means.

Clause 11 – Pre-commencement anonymity orders: appeals

32. Clause 11 concerns cases in which an anonymity order was made and the defendant who was convicted prior to the new provisions coming into force appeals against his conviction.
33. Clause 11(2)(a) provides that a conviction shall not be unsafe solely on the ground that the trial court had no power at common law to make the anonymity order, but clause 11(2)(b) provides that a conviction will be unsafe if the order could not have been made under the new provisions and 'as a result of the order, the defendant did not receive a fair trial'.
34. In our view, this provision is likely to produce only further uncertainty and is likely to prove unnecessary. First, since it is open to the appeal court to remand a prisoner in custody

pending a retrial in any event, prisoners convicted on the basis of anonymous evidence are unlikely to walk free. Secondly, the undue complexity and overbreadth of the conditions and considerations in clauses 4 and 5 respectively are likely only to cause further confusion. Moreover, we consider it likely that the appeal provisions in clause 11 will be found to breach Article 6 (the right to a fair trial) and 13 (the right to an effective remedy) of the European Convention on Human Rights, by unduly restraining the ability of the appeal court to quash a conviction based on anonymous evidence.

Clause 12 – Interpretation

35. Clause 12 provides that witness anonymity orders may be made by a range of courts including a magistrate's court. In our view, the complexity of anonymity orders and the gravity of the exception they represent to the common law principles of effective cross-examination make them inappropriate to be determined by a court beneath the level of the Crown Court.
36. Such orders would be particularly inappropriate where the magistrates sit as the tribunal of fact, e.g. assessing the credibility of witnesses for the purposes of anonymity before proceeding to determine the facts at issue.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
7 July 2008

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Examination of Witnesses (Questions 1-19)

SIR KEN MACDONALD QC

8 JULY 2008

Q1 Chairman: Good afternoon everybody. This is a special evidence session we are having on the Criminal Evidence (Witness Anonymity) Bill, which is very topical as we are debating it this afternoon on the floor of the House. Could I welcome Sir Ken Macdonald, the Director of Public Prosecutions. Thank you for coming in at pretty short notice to talk to us about this. Could I also remind colleagues, and you, Sir Ken, that we are under time constraints so if we could have short questions and short answers that would be very helpful if at all possible. Perhaps I could start by asking you what difficulties the Law Lords' ruling has created for you?

Sir Ken Macdonald: Obviously it is a situation which, as they hinted in their judgment, will have to be solved insofar as it can be by legislation. We have obviously regarded anonymity as a useful tool in certain types of cases and we are keen to preserve it in appropriate cases, always subject obviously to the defendant's rights to a fair trial; and that is the balance which the legislation has to achieve. Although it is not quite right to talk about a "balance" because the right to a fair trial is not a balanced right, it is an absolute right and that has to underpin whatever legislative scheme comes into force.

Q2 Chairman: How many current and pending cases are affected, and how many convictions do you think may be challenged on appeal?

Sir Ken Macdonald: We have done a trawl and these figures are subject to change because the situation just does change rapidly; but we think we have about 580 cases in which the question of anonymous witnesses had been intended to be raised before the ruling in *Davis* was handed down. This includes cases which are charged and awaiting trial; cases which are currently being tried; cases convicted but not yet sentenced; and cases both convicted and sentenced. These cases range from test drug purchases by undercover police officers, through cases involving undercover police officers embedded in serious criminal conspiracies, to members of the security services, to cases involving anonymous civilian witnesses, which I think is the category people have been most concerned about. We think there are about 50 cases involving civilian anonymous witnesses. I would say about 50 is the critical figure.

Q3 Chairman: Is there evidence that witness intimidation is increasing?

Sir Ken Macdonald: There is plenty of anecdotal evidence, particularly in certain parts

of the country. I myself have not seen firm figures on this. There is certainly an increasing reluctance on the part of people witnessing certain types of crime to come forward—whether that is due to direct acts of intimidation or to a perception that they might be in danger if they give evidence I do not know. Of course the other difficulty is that quite often people who witness serious crime are people who themselves are involved in criminality. This will quite often be the case, for example, in gangland-style executions, and shootings related to drug dealing. Witnesses in that category are, for very obvious reasons, sometimes reluctant to come forward.

Q4 Chairman: If we did not need this procedure in Northern Ireland at the height of the Troubles why do we need it in the UK now?

Sir Ken Macdonald: You have to make your own judgment about this, about whether you are prepared to tolerate a situation in which some categories of crime are not prosecuted. For all I know, there may be cases in Northern Ireland that were not prosecuted for that reason. Sometimes people say we managed in the 1960s with the Krays and the Richardsons. The point about the Krays and the Richardsons is that they were free to conduct their criminal campaigns for very, very many years precisely because people were afraid to testify against them, so I am not so sure the analogy is a good one. We have to be very careful only to use the power to anonymise witnesses in very particular circumstances; and, I repeat, in circumstances where it does not jeopardise the defendant's right to a fair trial. That is the fundamental judgement which the judge has to make.

Q5 Chairman: If it was a growing problem should we not have seen a greater increase in prosecutions with conspiracy to pervert the course of justice?

Sir Ken Macdonald: If we were able to catch people doing this, intimidating witnesses, I think we would. Whether there is such an increase, I do not know.

Q6 Chairman: Is the emergency bill essential? Could the Government have foreseen the problems earlier?

Sir Ken Macdonald: Every time we have made these applications they have been to a judge who has allowed them. The Court of Appeal has repeatedly upheld these arrangements; and the Law Lord who gave leave for this case to be brought before the House of Lords himself said he did not expect the appeal to succeed—so I am not sure how predictable the outcome was. We now have a clear judgment from our highest Court, and if the Government does not respond then I think the likelihood is that a large number of the 580 cases I have alluded to, and particularly the 50 involving civilian witnesses, will be at risk.

Q7 Chairman: Will you be applying for witness anonymity orders in cases like *Davis* in the future?

Sir Ken Macdonald: It is difficult to say, and I would have to study the cases of *Davis* very closely. I think there is a continuum here between a witness's accuracy being in question and the reliability of the witness being in question. I think myself, if this legislation is passed, the closer you get to the credibility end the less likely it is that we will be able to make successful applications for that evidence to be anonymised. In other words, if you are simply concerned about someone's accuracy and there is no reason to doubt the credibility of the witness, judges might, following this legislation, allow those witnesses to be anonymised if the conditions are met. If the witness's credibility is seriously in issue I think it would be much more difficult.

Q8 Chairman: If the basis of your case is the witness's evidence and the witness will only give evidence anonymously, what happens?

Sir Ken Macdonald: It depends again. If it is only a question of accuracy then my own view is that that could still be permissible. It is notable that Lord Mance who analysed the Strasbourg jurisprudence in the House of Lords judgment regards this potentially as still an open question. He says that soleness or decisiveness, maybe no more than a factor albeit an important one, to put into the balance when these issues are being determined. I can give you an example: an old lady standing in the street of impeccable character who sees a car number plate, writes it down on a piece of paper, and that is the decisive piece of evidence that ties someone in with a bank robbery. It may be that she could give her evidence anonymously without any prejudice being caused to the defendant at all. If she was a criminal associate of the defendant it might be very different.

Q9 Lord Dubs: How significant do you think is the Law Lords' ruling? In other words, does it simply require current practices to be put on a statutory footing; or do you think it makes clear that in certain circumstances anonymous evidence cannot be used because it is incompatible with the right to a fair trial?

Sir Ken Macdonald: I think it does both. It clearly says that the common law has been stretched too far, and if you want to stretch the common law this far you have got to rely on statute. I think it is also indicating that some categories of case would not be appropriate for anonymising; and the category of case would be, I think, a case where the evidence was sole or decisive and the credibility of the witness was open to question. This is my judgment only, but in future I do not think that witnesses in that category will be suitable for anonymising.

Q10 Lord Dubs: I think you have already answered the point about whether anonymous evidence should not be the sole or decisive factor in a conviction. I think you have already dealt with that?

Sir Ken Macdonald: Yes. I think it depends on the extent to which the credibility of the witness is in question.

Q11 Lord Dubs: Or could it be the extent to which such evidence is decisive whether that is no more than a very important factor to be balanced on the scales?

Sir Ken Macdonald: I think that is the correct formulation. I think it is an important factor. I just think if a witness's credibility is heavily in issue and the evidence is decisive that factor is likely to become overwhelming in arguing against the anonymising of a witness.

Q12 Lord Dubs: You have almost answered my third question which is: do you believe that convictions principally based on anonymous evidence will automatically be in breach of the right to a fair trial under the ECHR?

Sir Ken Macdonald: No, I do not. I can think of examples, and I have given one, where a conviction could be based on decisive anonymous evidence which would be perfectly consistent with a defendant's right to a fair trial. You would have to look at the circumstances I think in each case.

Q13 Dr Harris: There is plenty of scope for it to qualify for an appeal based on the formulation you have given if credibility was an issue if it was a major factor?

Sir Ken Macdonald: I would certainly expect appeals around this topic. Arguably, defence lawyers would be looking very closely at cases. I am concentrating on civilian cases here. I think police witness cases come into a different category. I would expect lawyers to be looking very closely at these cases in future.

Q14 Lord Lester of Herne Hill: In your view does the Bill itself correctly restate what was understood to be the common law position on witness anonymity before the Law Lords' ruling?

Sir Ken Macdonald: I think it does. It seems to me that the Bill as currently drafted does give absolute primacy to the requirement that the defendant's trial is fair; everything else is subjugated to that. The basic common law principle is that the judge has to ensure that the trial is fair and the defendant receives a fair trial. I think the extent to which the Bill is eager to make that its starting point is a useful and helpful thing.

Q15 Lord Lester of Herne Hill: The judges of course are under a Human Rights Act duty, are they not, to interpret and apply this Bill, if it becomes law, in a way that secures Article 6 fair trial rights?

Sir Ken Macdonald: Yes.

Q16 Lord Lester of Herne Hill: Presumably the safeguards in the Bill are nevertheless very important. Can I just deal with two raised by the Law Society in their helpful briefing today. The first is about the equality of arms in relation to clause 3(2). Clause 3(2) is the provision that requires the defendant to "inform the prosecutor of the identity of the witness in relation to whom they seek an order". The first thing that the Law Society asks is how that would sit with the duty of disclosure the prosecutor would then owe to other defendants. They say: "What if the defence witness has reasonable grounds to fear reprisals and a threat to their safety from corrupt police officers?" They say that while it may be okay in some cases there is no provision to allow for circumstances where that would be inappropriate; and suggest that the principle of equality of arms for prosecution and defence is displaced to a disproportionate degree by this provision. That is the burden of what they say. What is your reply to that?

Sir Ken Macdonald: I do not agree with them. I think the fact of the matter is that in this sort of situation the different parties on occasions have different relationships with the court. The Bill envisages a situation in which it is appropriate for the prosecution not to disclose to the defendant the identity of a witness because that identification might threaten the safety of the prosecution witness. I do not accept that by requiring the defendant to inform the Crown of the identity of his anonymous witness that he is under threat. I think that you could quite easily imagine a situation in which the judge would be perfectly content that that material is not disclosable to co-defendants. Of course you might have a situation where the judge took the view that it would have to be disclosed to co-defendants, and in those circumstances the prosecution would always have the option of abandoning the trial rather than complying with that direction, which is something we sometimes do in PII cases.

Q17 Lord Lester of Herne Hill: Thank you very much for that helpful answer. The second and perhaps more important point they raise is about clause 4 and the conditions for making the order. They point out, as seems to be clear, that the conditions are very, very broad. "The test of necessity in clause 4(3) is very low in that, by condition A in clause 4(3)(a), it must be necessary to 'protect the safety of the witness ...', but there is no requirement that any actual threat has been made ..." They go on to criticise that. Then they say this: "Thus, it appears possible that an order could be made in relation to a

witness in any criminal case, regardless of how serious it is alleged to be, who claims a general non-specific unease about testifying openly, and who therefore refuses to testify, without any actual threat or any suggestion of fault on the part of the defendant ... " etc. They compare it with New Zealand, where the court must find that the safety of the witness is likely to be endangered. They say that the other test "to prevent real harm to the public interest" is particularly unclear and potentially very wide indeed. Those are all criticism over broad discretion and an absence of sufficient safeguard. I wonder if you could deal with those?

Sir Ken Macdonald: I think it is important to look at clause 4 in its totality. It includes, of course, subsection (4) which requires consistency with a fair trial. I think, so far as the drafting is concerned, in all fairness this is really a matter for Parliament to determine for itself. I think that it is perfectly clear that one effect of this Bill will be that there will be less applications for anonymity in the future than there have been in the past. I would be very surprised if these applications were not being very carefully scrutinised by judges. I can understand what they are saying but I think the precise terms of the drafting are really a matter for Parliament to decide.

Q18 Lord Lester of Herne Hill: Because the Human Rights Act trumps everything in terms of a fair trial?

Sir Ken Macdonald: Yes.

Q19 Lord Lester of Herne Hill: Therefore the judge has got to get it right?

Sir Ken Macdonald: Yes.

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Joint Committee on Human Rights Minutes of Evidence

Examination of Witnesses (Questions 20-39)

SIR KEN MACDONALD QC

8 JULY 2008

Q20 Lord Lester of Herne Hill: If a judge got it wrong there would be 50 mistrials and 50 sets of litigation arising from pending cases which would very bad indeed, but you think that is not a likely outcome?

Sir Ken Macdonald: I do not think it is. I think the fact is that the fairness of the trial, as you have indicated, trumps everything else in this process, and that is the first conclusion the judge has to come to—that if I allow this order the defendant can receive a fair trial.

Q21 Dr Harris: Could I just ask you as a follow-up, on this issue of disclosure to the prosecutor it is written in terms of "must". The defendant must inform the prosecutor, and that is an invariable. What is the overriding need for the judge to be forced to have no discretion in that matter? Why are you as head of prosecution supporting and presumably demanding of this provision in 3(2)?

Sir Ken Macdonald: If we are anonymising a witness we are under a legal duty to disclose certain material to the defence around the credibility of that witness. That is an obligation on us under basic disclosure principles. There is no such obligation upon the defence. They could call an anonymous witness without telling us who that individual was, and without telling us anything at all about that witness's antecedence, his character, his associations, or anything which would enable us to at least go some way to be capable of fairly cross-examining him.

Q22 Dr Harris: Could you not achieve what you want by a combination of a reciprocal duty of disclosure of that sort of material where it is helpful to the prosecution, and mirror, as it were, together with a discretion for the judge?

Sir Ken Macdonald: I do not think so. I think that those sorts of checks have to be conducted by a state agency, otherwise one is simply relying upon assertion. If we do a check as a prosecution, we check criminal records, we check intelligence files and we check all of the databases which the Crown and the State has access to. If the defence are conducting those sorts of inquiries these are not subject, so far as I can see, to any quality control at all and I think that is too much of a risk. I think the danger is that you simply have people calling witnesses about whom no-one really knew anything at all, and I think that could devalue the trial process.

Q23 Dr Harris: In terms of the considerations that must be made, you will be aware that although the Bill purports to model itself to a degree on the New Zealand legislation, not all of the considerations included in the New Zealand legislation are included in clause 5. I was wondering what you thought about the merits of including as considerations the principle that witness anonymity orders are justified only in exceptional circumstances; and that the gravity of the offence must be a factor, and that partly overlaps some of the other issues by talking about the solely or decisive extent on the testimony. There is a question of the importance of the witness evidence and of other corroborating evidence. On those two—the gravity of the offence and the principle of exceptionality, if I can call it that—they are missing from this Bill, although included in terms in the New Zealand legislation. Could you explain that?

Sir Ken Macdonald: I think exceptionality again is a matter for Parliament really. I know some of these proposals are going to go forward as amendments and I do not want to get involved in a debate about that. So far as exceptionality is concerned, the Bill really speaks for itself. It sets out a scheme which is clearly designed to apply only, it seems to me, in exceptional circumstances. It seems to me to do it quite carefully; it seems to me to make it plain that this is all subject to the fairness of the trial; and at 4(6) it requires the court: "In determining whether the measures to be specified in the order are necessary for the purposes mentioned, the court must have regard (in particular) to any reasonable fear on the part of the witness—that the witness or another person would suffer death or injury, or that there would be serious damage to property. This use of the word "reasonable" in this subsection is extremely important because it implies the court would have to enquire into the fear to determine whether there was some basis for it; and that is implicit.

Q24 Dr Harris: Yes I was going to come on to that. My questions were about (a) exceptionality and (b) another example is the gravity of the offence. Of course Parliament is going to vote and we are not going to be mandated by you, but Parliament looks to certain people providing evidence to select committees for advice, as on 42 days, and then we vote. I am asking whether you would have a problem from your point of view in, for example, the gravity of the offence being included within that non-exhaustive list of considerations?

Sir Ken Macdonald: I think you would need to define "gravity". I am not trying to be difficult. Let me give you an example: there are some cases at the moment which are heard really in the magistrates' court but which nevertheless are cases under terrorism legislation, having an article for a terrorist purpose, and one or two other offences in that category, possession of an article useful to a terrorist, membership of a proscribed organisation, terrorist training offences, encouragement of terrorism, distribution of terrorist material. These cases can be heard in the magistrates' court. Query whether they are grave offences; I do not know. I think it is probably true to say though that it is very, very unusual, and I am not sure we have come up with a single case in which anonymity has been sought in the magistrates' court. I am not saying it has never happened. I think we have come up with one youth court case but our trawl has not revealed much of a level of witness anonymity in the lower courts.

Q25 Lord Lester of Herne Hill: In principle I cannot understand why gravity of offence is a relevant factor given that there should be a fair trial in all cases and the problem of anonymity arises in all cases. Why should that weigh as an important relevant factor; it cuts both ways, does it not?

Sir Ken Macdonald: I see your point.

