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# Article 6 in the Supreme Court: Conflicting Views on the Right of Confrontation

Bird, James

# ARTICLE 6 IN THE SUPREME COURT: CONFLICTING VIEWS ON THE RIGHT OF CONFRONTATION

***James Bird*[1]**

## Abstract

This article explores the disparate jurisprudence of the European Court of Human Rights and the appellate courts of England and Wales in relation to Article 6 European Convention on Human Rights, the right to a fair trial. It examines the differing views of the UK and Strasbourg courts in relation to the right of confrontation and argues that in the absence of provision for reform, the statutory safeguards employed by the UK criminal justice system strike an appropriate balance between the rights of defendants and the rights of victims and witnesses in criminal trials.

**Keywords:** Article 6 ECHR right of confrontation, absent and anonymous witnesses

## Introduction

On 20 January 2009 the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Al-Khawaja and Tahery v UK*.[2] The case concerned two defendants who contended that their right to a fair trial as provided by Article 6 (Art.6) of the European Convention on Human Rights (the Convention) had been infringed because they were deprived of their right to confront witnesses against them. The right of confrontation under Art.6 of the Convention affords the defendant the right to 'examine or have examined witnesses against him'[3]. The right has been described by Lusty as a 'central and defining feature of the adversarial system of criminal trial.'[4] As Ormerod et al write, the potential

[1] James is currently looking for a training contract and studying the Legal Practice Course at the University of Law's Bristol centre. He can be contacted at jameslewisbird@gmail.com.
[2] (2009) 49 EHRR 1.
[3] The European Convention on Human Rights Art.6(3)(d).
[4] Dennis, I., 'The right to confront witnesses: meanings, myths and human rights,' *Criminal Law Review* (2010), 255-274, p. 255 citing Lusty, D; 'Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials,' (2002) *24 Sydney Law Review* p.361.

detriment to the defendant's case as a result of any denial of the right to confrontation is significant:

> It is impossible to investigate fully the credibility of an anonymous witness…the defendant has no opportunity to assess the demeanour of the witness; the defendant's ability to examine a witness is unequal to the Crown's [and] there is a potential conflict with Art.6(3)(d) of [the Convention].[5]

In the seminal US case of *Knauff v Shaughnessy*, Jackson J made the following statement, which serves as a potent illustration of the concerns raised when a defendant is denied their right to confrontation:

> The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.[6]

This article will show that the ECtHR is sympathetic to this interpretation of the right; indeed the Court's recent interpretations of Art.6 have purported to endow the right with a near absolute status. In stark contrast, under English law, the right to confrontation has always been the subject of numerous exceptions[7]. Dennis submits that it is inappropriate to afford the defendant an absolute right to confrontation, because 'witnesses… may also have claims against the state for protection of their interests.'[8] Whereas the ECtHR advocates a blanket rule against the admissibility in evidence of statements made by absent or anonymous witnesses where this is the 'sole or decisive' evidence against the accused'[9] (at least minus very limited circumstances), the English legal system has recognised that 'despite all the rhetoric, in none of its various forms is the right to confrontation absolute'.[10] English law allows the trial court a measure of discretion to conduct a fact-sensitive appraisal of whether the defendant's general right to a fair trial will be infringed if the evidence of unavailable or anonymous witnesses is adduced. This discretion is countenanced by a strict statutory framework which allows for the rights of the defendant to be balanced against the rights of the witness. As Dennis has memorably observed:

> Face-to-face confrontation will be untenable as a desirable ethical rule when applied, for example, to an abused child testifying against her abuser, or an elderly neighbour testifying against…an alleged gang of violent youths.[11]

[5] Ormerod, D., Choo, A., Easter, R., 'Coroners and Justice Act 2009: the 'witness anonymity' and 'investigation anonymity' provisions', *Criminal Law Review (*2010), 368-388 at p.369
[6] (1950) 338 US 537 p.551.
[7] O'Brian, W. E., 'Confrontation: The Defiance of the English Courts', *International Journal of Evidence & Proof* (2011), 15(2), 93-116 at p.93.
[8] Dennis; The right to confront witnesses, p.257.
[9] *Luca v Italy* (2003) 36 EHRR 807 at para.40; affirmed *Al-Khawaja* (2009) at para.37.
[10] Dennis; The right to confront witnesses, p.256.
[11] Ibid, p.265.

The facts of *Al-Khawaja* exemplify the issues engaged by the debate. The first applicant had been convicted of rape as a result of the admission in evidence of the statement of his deceased victim. The second applicant had been convicted of wounding on the basis of a statement made by an eyewitness who was too frightened to attend court. Each applicant submitted that the fact that he had been deprived of the opportunity to cross-examine a witness whose evidence constituted the sole or decisive evidence against him had breached his right to a fair trial.

The Court found a breach of Art.6 in relation to both applicants, holding that the only circumstance in which it is acceptable to convict a defendant on the sole or decisive evidence of absent or anonymous witnesses is where the defendant himself is responsible for intimidating the witness. The Court continued:

> 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.[12]

The decision marks the culmination of a period of disparate jurisprudence between the ECtHR and domestic courts in relation to the admissibility of evidence in cases where the statements of absent or anonymous witnesses have been the 'sole or decisive' basis for conviction. Shortly after the decision, the UK Supreme Court (UKSC) in *R v Horncastle*[13] expressly refused to follow *Al-Khawaja,* founding its decision on a range of factors, including, inter alia, that the hearsay rule as provided for by the Criminal Justice Act 2003 (CJA 2003), 'contains safeguards which render the "sole or decisive" rule unnecessary'.[14]

This article will demonstrate that the decision in *Horncastle* represents the correct approach to be taken to the evidence of absent and anonymous witnesses. It will be argued that adhering to a strict application of the 'sole or decisive' test propounded by the ECtHR would be misguided, resulting in at worst the acquittal of dangerous criminals and at best the neglect of witnesses' Convention rights.

## 1 Criminal Evidence Procedure and the Convention

Art.6(3)(d) of the Convention provides that:

> Everyone charged with a criminal offence has the following minimum rights: To examine or have examined witnesses against him and to obtain the attendance and

[12] *Al-Khawaja* (2009) at para.37.
[13] [2009] UKSC 14
[14] Ibid. at para.14

> examination of witnesses on his behalf under the same conditions as witnesses against him.

The comparable English law in this area is encompassed by what is commonly known as the 'hearsay rule'. The common law hearsay rule, broadly speaking, provided that 'any assertion, other than one made by a person while giving oral evidence in [trial] proceedings, was inadmissible if tendered as evidence of the facts asserted'.[15] The law in the area has now been codified by the CJA 2003.

The CJA 2003 allows for derogation from the general principle of a right to confrontation in defined circumstances where a witness is unavailable. Similarly, the Coroners and Justice Act 2009 (C&JA 2009) sanctions a restriction of the right to confrontation (insofar as the defendant will not be permitted to know the identity of the witness) only in circumstances where anonymity is necessary; to protect the safety of the witness or another person, or; to protect against real harm to the public interest, or; to protect against serious damage to property.[16] It has been widely accepted that many of the issues (i.e. the detriment to the defence case) arising from cases involving anonymous witnesses apply equally to those cases which involve absent witnesses.[17]

The key provisions of the CJA 2003 in respect of absent witnesses are contained within section 116. In short, the evidence of an absent witness may be admissible if; the statement is of a type that would be admitted if the witness was present to give oral evidence at trial, and the witness has been identified to the court's satisfaction, and the witness satisfies one of the five categories provided for by section.116(2). The case law of both the ECtHR and domestic courts has developed principally with regard to two of the categories provided for by section.116(2); i.e. cases where the witness is absent because they are dead,[18] and cases where the witness is absent due to fear.[19] The statute makes clear that 'fear is to be widely construed' by UK courts to include a fear of death, the fear of injury or the fear of the death or injury of another person.[20] Importantly, s.116 establishes a requirement for leave of the court to be obtained if the evidence of a witness who is absent due to fear is to be read at trial. Leave will only be granted if it is in the interests of justice that the statement is admitted, having regard to the risk that unfairness will result to any party in the proceedings.

[15] Keane, A., Griffiths, J., McKeown, P., *The Modern Law of Evidence*; (8th Ed, Oxford University Press, 2010) citing Lord Havers in *R v Sharp* [1988] 1 WLR 7 HL at p.255.
[16] Coroners and Justice Act 2009, ss.88(3)(a)-(b).
[17] O'Brian, 'Confrontation',p.101.
[18] Criminal Justice Act 2003, s.116(2)(a).
[19] Ibid, s.116(2)(e).
[20] Ibid, s.116(3).

Witness anonymity orders are governed by Part 3 C&JA 2009. The circumstances under which a witness anonymity order may be granted have already been delineated; however, the statute also requires a number of other conditions to be satisfied before an order is made which will be discussed further in section 5. The mere fact that the right provided for by Art.6(3)(d) is subject to exceptions under English law is the starting point for much of the conflict that has arisen. The ECtHR has considered the UK courts' interpretation of Art.6(3), that the rights contained within are 'illustrations of matters to be taken into account' when deciding whether a fair trial has been held,[21] to be unsatisfactory, arguing instead that the these provisions 'constitute express guarantees.'[22]

The conflicting views of commentators are symptomatic of the competing social and public policy considerations that underlie the debate. As Ormerod et al elucidate, these include:

> The need to secure evidence in cases in which increasingly commonly witnesses are unwilling to provide evidence for fear of reprisals[23]; the need to protect witnesses and their rights…[and]; the disadvantages faced by the defendant and whether these render the process so unfair as to deny the accused a fair trial.[24]

This discussion will demonstrate that in seeking to strike a balance that best meets these interests of justice, the blanket rule that has been erratically developed by the ECtHR is of little to no assistance. The discordant nature of earlier Strasbourg jurisprudence is explored below.

### *The Earlier ECtHR Cases*

The previous leading case on the subject in the ECtHR was *Luca v Italy.* The case concerned two defendants charged with drug-trafficking. The primary witness remained silent at trial (he was entitled to do so as a person accused in connected proceedings[25]) and the applicants were convicted on the basis of his earlier statement. The Court found a violation of Art. 6 and stated 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 Art.6.[26]

[21] *R v Sellick* [2005] EWCA Crim 651.
[22] *Al-Khawaja* (2009) at para.34.
[23] Tarling, R., et al., *Victim and Witness Intimidation: Findings from the British Crime Survey* (2000)
[24] Ormerod et al., 'Coroners and Justice Act'. p.368.
[25] Requa, M., 'Absent witnesses and the UK Supreme Court: judicial deference as judicial dialogue?' *International Journal of Evidence & Proof* (2010), 14(3) 208-231, p.215.
[26] *Luca v Italy* (2003) para.40.

However, 'this fairly strong stand by the ECtHR had until recently been…undermined by two common features of its decisions.'[27] Firstly, the Court had consistently suggested that the rights encapsulated in Art.6(3)(d) are merely aspects of the overall right to a fair trial guaranteed by Art.6(1). Secondly, in a series of cases where the defendant was convicted based *in part* on evidence from witnesses that the defence had never been able to question, the Strasbourg Court had found no violation of Art.6 as there was other evidence against the accused. In the Dutch case of *Doorson v Netherlands,* a case in which the operation of counterbalancing measures and the availability of corroborating evidence were found to compensate for the Art.6(3)(d) shortcomings in the trial,[28] the Court held that:

> It is true that Art.6 does not explicitly require the interests… of witnesses and victims... to be taken into consideration. However… principles of a fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses.[29]

It is arguable that this balancing procedure is more consistent with the overarching themes of the Convention than the 'sole or decisive' test. The Privy Council observed in the case of *Grant v The Queen* that the ECtHR itself had previously indicated the need to search for a fair balance between the general interests of the community and the rights of the individual.[30] The 'sole or decisive' test contradicts this ideology because it prefers the interests of the defendant to those of other participants in the trial process.[31]

Furthermore, the Strasbourg Court has repeatedly indicated that rules of evidence are primarily matters for regulation by domestic law. This is demonstrated by the case of *Kostovski v The Netherlands,* in which the Court held that 'it has to be recalled from the outset that the admissibility of evidence is primarily a matter for regulation by national law.'[32] In that case, the Court found a violation of Art.6, because the conviction was founded 'to a decisive extent' on the statements of anonymous witnesses.[33] Notably, the Court acknowledged the need for the 'introduction of appropriate measures' to combat organised crime. The comments of the ECtHR in *Kostovski* are important for two reasons; 1) they are evidence of an early formulation of the 'sole and decisive' test, and 2) they highlight the often contradictory nature of Strasbourg jurisprudence in this area.

[27] O'Brian, 'Confrontation', p.95.
[28] Requa, 'Absent Witnesses', p.215.
[29] *Doorson v Netherlands* (1996) 22 EHRR 30 at para.70.
[30] *Grant v The Queen* [2007] 1 AC 1 PC at 17.
[31] Dennis, 'The right to confront witnesses', p.272.
[32] *Kostovski v The Netherlands* (1989) 12 EHRR 434 at para.39.
[33] Ibid, para.44

The Strasbourg jurisprudence 'does not require all witnesses to be examined by the accused or his counsel,'[34] this is illustrated by *Doorson*. Nonetheless, as Birch has observed, the historical case law of the ECtHR does require that the statements of absent or anonymous witnesses should not be the sole or decisive basis of conviction.[35]

Conversely, UK courts have adopted a more flexible approach to the admissibility in evidence of statements of anonymous or absent witnesses. The author considers this the correct approach to be taken, because the 'sole or decisive rule' is 'impracticable and overbroad.[36] However, one exceptional case, heard in the House of Lords, briefly elevated the right to confrontation under English law to similarly absolute status as the judges of the ECtHR in *Al-Khawaja.* This was the case of *R v Davis.*[37]

***The Earlier UK Cases; R v Davis and Beyond***

*Davis* concerned a defendant who had been convicted of two counts of murder on the basis of the statements of anonymous witnesses. It was accepted that 'without the evidence of the three witnesses, the appellant could not have been convicted.'[38]

As O'Brian notes, the *Davis* decision reads very differently from that of the decision in *Horncastle,* in fact; '[*Davis*] is a ringing endorsement of the importance of confrontation to a fair trial.'[39] Lord Bingham, in the course of his judgment in *Davis*, concluded that 'no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses'[40] suggesting that this was 'irreconcilable with long-standing principle'.[41] The Court went on to hold that Davis had been unlawfully convicted, and his appeal was allowed.

It is perhaps important to recall at this stage that although the House of Lords in *Davis* concerned itself only with a discussion of the admissibility in evidence of the statements of anonymous witnesses, many of the issues (i.e. the detriment to the defence case) arising from cases involving anonymous witnesses apply equally to those cases which involve absent witnesses.[42] The UKSC recognised this in *Horncastle.*[43] Similarly, in *Al-Khawaja,* the

[34] Requa, 'Absent Witnesses,' p.216.
[35] Birch, D., 'Hearsay: Same Old Story, Same Old Song?' *Criminal Law Review* (2004) 556 at 567.
[36] Dennis, 'The right to confront witnesses,' p.272.
[37] *R v Davis* [2008] UKHL 36.
[38] Ibid, para.3.
[39] O'Brian, 'Confrontation,' p.102.
[40] *R v Davis* [2008] at para.25.
[41] Ibid, para.29.
[42] O'Brian, 'Confrontation,' p.101.
[43] *R v Horncastle* [2009] para.48.

ECtHR suggested that the sole or decisive rule should apply equally in the case of anonymous and absent witnesses.[44]

It can be argued that Lord Bingham's assertion, that the use of anonymity orders where the evidence of the witness was the sole or decisive evidence against the defendant was 'irreconcilable with long-standing principle',[45] was inaccurate. In fact, the decision of the House of Lords in *Davis* ran contrary to a number of recent decisions of the UK courts. In *R v Sellick,*[46] a case which concerned the statement of an absent witness, the Court of Appeal had stressed that the question of whether Art.6 had been infringed was 'very fact sensitive'[47] and in cases where the defendant was responsible for the fear of the witness the defendant has deprived himself of his right to confrontation.[48] In *R v Cole* the Court of Appeal noted that there was no 'absolute rule that evidence of a statement cannot be adduced in evidence unless the defendant has an opportunity to examine the maker.'[49] Potter LJ had expressed his opinion in the case of *R v M* that it would be an intolerable result if the *Luca* statement were to admit of no exceptions.[50] Further, in *Grant v The Queen*, The Board had expressly endorsed this line of cases.[51]

It follows that the supporting justification for the decision in *Davis* was thin.[52] The House of Lords sought to afford the right to confrontation near absolute status[53] and were at pains to stress the historical importance of the right at common law.[54] However, as Dennis explains, Their Lordships… rested this claim mainly on institutional writers whose principal focus was the value of public trial.[55] Further, Dennis argues that by placing importance upon the absence of recommendations for anonymity in the Diplock[56] and Gardiner[57] reports of the 1970s, the House of Lords failed to take into account the changed Parliamentary attitudes towards cross-examination.[58] This assertion is evidenced by the introduction of measures in the intervening years to restrict the scope and conduct of cross-examination. An example of one such provision is s41 Youth Justice and Criminal Evidence Act 1999, which operates to

[44] *Al-Khawaja* (2009) at 36.
[45] *R v Davis* [2008] para.29
[46] *R v Sellick* [2005]
[47] Ibid, para.38.
[48] Ibid, para.37.
[49] *R v Cole* [2007] EWCA Crim 1924 para.20.
[50] *R v M* [2003] EWCA Crim 357 para.59-60.
[51] *Grant v The Queen* [2007] para.19.
[52] Dennis, 'The right to confront witnesses,' p.269.
[53] Ibid,
[54] *R v Davis* [2008] para.5
[55] Dennis, 'The right to confront witnesses,' p.269.
[56] *Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland* (Diplock Report) (HMSO, 1972), Cmnd.5185 p.20.
[57] *Report of a committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland* (Gardiner Report) (HMSO, 1975), Cmnd.5847, Ch.2, p.55.
[58] Dennis, 'The right to confront witnesses,' p.269.

restrict the circumstances in which a rape complainant may be questioned as to their previous sexual history.

It is therefore arguable that the House of Lords in *Davis* were incorrect to follow *Luca*. As a result of the *Davis* decision, dozens of murder trials were in danger of collapse[59] and amid the clamour Parliament rushed to restore the legality of witness anonymity orders. The result was the Criminal Evidence (Witness Anonymity) Act 2008. The Act represented a return to the pre-*Davis* position more corresponsive with the Court of Appeal's statement in *Sellick* that the question of whether Art.6 has been infringed is very fact-sensitive.[60] The provisions of the 2008 Act were largely re-enacted wholesale by virtue of Part 3 of the Coroners and Justice Act 2009 (outlined above).

Upon examination of UK jurisprudence, the literal reading of Art.6 advanced by the House of Lords in *Davis* stood incongruous amongst a procession of utilitarian decisions handed down by the Court of Appeal. Following the statutory rescue of witness anonymity orders, the English approach to the admissibility in evidence of the statements of anonymous (and, by analogy, absent) witnesses was on a collision course with that of the ECtHR.[61] The two Courts finally addressed each other in the cases of *Al-Khawaja* and *Horncastle.*

***Al- Khawaja and Horncastle:***

*Al-Khawaja* is the ECtHR's 'most explicit reaffirmation of the right of the defendant to examine witnesses against him.'[62] In Al-Khawaja's case, the victim of an alleged rape had committed suicide before the trial, and her earlier statement was read to the jury, in conjunction with further corroborating evidence. In Tahery's case, the eyewitness to a stabbing was absent due to fear not attributed to the defendant, and again the witnesses' statement was read to the trial court.

The Court concluded that a conviction secured by a statement in the absence of the opportunity to examine the maker simply could not be reconciled with Art.6. The ECtHR also rejected the proposition that the presence of general or specific safeguards, such as adherence to statutory tests, the Court of Appeal review, the ability of the defendants to challenge the credibility of witnesses and jury warnings were sufficient to remedy the disadvantage to the defendant.[63]

[59] Lea, M., 'Emergency laws allowing anonymous witnesses in trials to be in place within weeks', *The Daily Mail,* 25 June 2008.
[60] *R v Sellick* [2005] para.38.
[61] O'Brian, 'Confrontation,' p.106.
[62] Ibid, p.99
[63] *Al-Khawaja* (2009) para's. 40-42, 46-47

The Court condemned the Court of Appeal's interpretation of Art.6 in *Sellick* that the rights set forth under Art.6(3) constitute illustrations of the matters that should be taken into account when considering whether a fair trial has been held. Instead, the Court declared these provisions to be 'express guarantees'.[64] The Court also rejected the argument that cases such as *Doorson* could be read as authority to the contrary, contending that in *Doorson* the defendant's counsel was able to examine the witness 'in some form or other',[65] which was considered sufficient in light of the wording of the Convention. In March 2010, the UK government took the unusual step of applying to have the cases referred to the Grand Chamber of the ECtHR, which will only hear 'exceptional'[66] cases (this decision is considered further below). The Supreme Court in *Horncastle* refused to follow *Al-Khawaja* in the interim.

The *Horncastle* case also concerned two joint appeals. The appellants in the first case were convicted on a charge of grievous bodily harm when the witness statement of their deceased victim was read at trial. The second case concerned two appellants who were convicted of kidnapping a young woman whose earlier witness statement was admitted in evidence when she became too frightened to attend court. The appellants' sought to rely on *Al-Khawaja* as a basis for establishing that their Art.6 right had been infringed.

The Supreme Court delivered a unanimous verdict reproving the decision in *Al-Khawaja.* The Court exercised its discretion under section2(1) of the Human Rights Act 1998 to decline to follow a Strasbourg judgment. Lord Phillips, giving the leading judgment, advanced a multitude of reasons for the Court's decision, the most important of which for the purposes of this discussion is that; 'the regime enacted by Parliament contains safeguards that render the sole or decisive rule unnecessary.'[67] Lord Phillips also defended as Art.6 compliant the provisions of the Criminal Evidence (Witness Anonymity) Act 2008, and so, by analogy, the provisions of the C&JA 2009 were also so defended.

In the operative passage of his judgment, Lord Phillips expressed his concern that 'if applied rigorously, [the sole or decisive test] could result in the acquittal, or failure to prosecute, Defendants where there is cogent evidence of their guilt'.[68] Lord Phillips gave the example of a witness to a hit and run accident in which a cyclist is killed; he gives a detailed witness statement to the police, in which he supplies the registration number, the make and the model of the car and the fact that a man with a beard was driving it. Later, the witness

[64] Ibid, para.34
[65] Ibid, para.37
[66] European Court of Human Rights: *The General Practice followed by the Panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention* p.4
[67] *Horncastle* [2009] para.14
[68] Ibid, para.105

himself is killed in an accident. The police subsequently arrest a bearded man who owns the car described by the witness, and this man refuses to answer questions put to him regarding his whereabouts at the relevant time. As Lord Phillips observes, 'it seems hard to justify a rule that would preclude the conviction of the owner of the car on the basis of the statement of the deceased witness',[69] yet that is the effect of the 'sole and decisive' rule. It is argued that the rule is both arbitrary and draconian and that the exemplary instance imagined by Lord Phillips is exactly the kind of injustice that the CJA 2003 was drafted to avoid. The Supreme Court concluded by articulating a hope that the ECtHR would reconsider its position in *Al-Khawaja,* before the Grand Chamber.

## 2 Analysis

It is submitted that the position advanced by the ECtHR in *Al-Khawaja* is indeed both unnecessary and overbroad. There are conceptual and practical justifications that support the UKSC's refusal to apply the rule, and both require critical analysis. The main critics of *Horncastle* value the defendant's right to confrontation above the rights of victims and witnesses. O'Brian maintains that 'the mere fact that a witness is afraid to testify can never justify depriving a defendant of the right to question him if the defendant is not responsible for that fear'.[70]

O'Brian appears to prioritise what Dennis has termed the 'non-consequentialist' justifications for the right to confrontation. Supporters of the non-consequentialist school of thought consider the right to confrontation to be of fundamental moral value, in that it affords the defendant a critical right to participate in the trial process, rather than 'simply being administered to in a way designed to maximise factual accuracy'.[71] Dennis explains that non-consequentialist rationales see confrontation rights as:

> procedures for giving effect to the defendant's claim to concern for his interests as a participant in the process of adjudication. [As such the right should operate to] maximise his opportunities for participation, irrespective of the impact of participation on the outcome.'[72]

By contrast, the maximisation of factual accuracy is the primary concern of those who prefer to prioritise what Dennis regards as the 'instrumentalist' justifications for the right to

[69] Ibid, para.91
[70] O'Brian, 'Confrontation,' p.109.
[71] Ibid, p.113.
[72] Dennis, 'The right to confront witnesses,' p.270.

confrontation. Instrumentalist rationales 'argue for confrontation rights as procedures to test the probative value of the evidence against the defendant.'[73]

Dennis has opined an attractive conceptual theory; that the right to confrontation has an important role to play in establishing the legitimacy of a verdict in a criminal trial. He explains that the legitimacy of a verdict is derived from; inter alia, factual accuracy and moral authority.[74] The factual accuracy of a verdict is defined by its correctness as a decision that the defendant did in fact commit the offence charged. The instrumentalist view of the role of cross-examination is that it serves primarily as a tool for establishing the factual accuracy of the evidence upon which a verdict is based. Factual accuracy is a quality in which the defendant has a unique interest, because it is he who is subject to wrongful punishment if he is convicted as a result of a factually inaccurate verdict.[75] It follows that, if it can be established by other means that evidence is reliable, or if alternate indications of reliability exist, then the handicap to the defence that arises from a restriction of the right is compensated for 'even where the evidence is crucially important'.[76] This finding of reliability could be based upon a variety of factors; whether the evidence of the witness whom the defence has been denied the opportunity to examine is corroborated; whether there is any further, circumstantial evidence to support the witnesses' assertions, or; by a finding of judicial admissibility in accordance with the provisions of the CJA 2003, which in Lord Phillips' words contains a 'crafted code designed to ensure that evidence is admitted only when it is fair that it should be.'[77]

The UKSC appears to be adopting the instrumentalist view of the importance of confrontation in its judgment of *Horncastle.* Lord Phillips concludes that the Strasbourg Court appears to have developed the sole or decisive rule on the basis 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…will not be safe'.[78] By 'safe' Lord Phillips 'appears to be referring to whether the conviction is factually accurate.'[79]

Conversely, the non-consequentialist view of the importance of the right to confrontation is founded on a principle of moral authority, that is; the political morality of treating defendants with dignity and respect (the principle of fair treatment). Dennis argues that this 'principle of fair treatment' forms part of the defendant's right to a fair trial, but it is not a quality in which

[73] Ibid.
[74] Ibid, p.258.
[75] Ibid, p.259.
[76] Ibid, p.273.
[77] *Horncastle* [2009] para.36.
[78] Ibid, para.86.
[79] Dennis, 'The right to confront witnesses,' p.271.

the defendant has a unique interest because 'other citizens involved in proceedings… namely witnesses and victims, also have justifiable claims to fair treatment'.[80] Accordingly, Dennis proposes that

> non-consequentialist arguments for a right to confrontation…may fairly be balanced against the competing arguments for restrictions on confrontation designed to protect the legitimate interests of other participants founded on the same principle.[81]

It follows that a defendant's right to confrontation can fairly be forfeit under defined circumstances (such as those provided for by the CJA 2003) insofar as this does not unjustly inhibit the instrumental value of cross-examination.

There is therefore a principled conceptual basis for the denial of a defendant's right to confrontation in some circumstances. In addition, there are also (perhaps more important) practical justifications for the denial of a defendant's right to confrontation. As a starting point for this discussion, it is pertinent to recall the reasons advanced by Lord Phillips for refusing to apply the 'sole or decisive' test in our jurisdiction.

## 3 The Statutory Safeguards

Lord Phillips rightly asserted that the CJA 2003 'contains safeguards that render the sole or decisive rule unnecessary'.[82] As Worthern writes:

> A decision to admit hearsay evidence will not be taken quickly under the statutory rules: it will be a lengthy process involving the courts weighing up whether to exercise several discretionary powers.[83]

The CJA 2003 is the product of a substantial review of the criminal justice system. Parliament based its hearsay reforms largely on a report of the Law Commission. In a section entitled 'The Justifications for the Hearsay Rule', the Commission expressed a concern that in some cases, 'little can be gained from cross examination… [in fact] some witnesses are put at a particular disadvantage'[84] by it. On this basis, the Commission argued that whilst a witness should be required to attend court if possible, where hearsay *was* admitted, a warning to the jury (amongst other safeguards) would be sufficient to remedy the detriment to the defence.

[80] Ibid, p.260.
[81] Ibid, p.273.
[82] *Horncastle* [2009] para.14.
[83] Worthern, T., 'The hearsay provisions of the Criminal Justice Act 2003: so far, not so good? *Criminal Law Review* (2008), 6, 431-442 pp. 441-442.
[84] Law Commission Report No. 245: *Evidence in Criminal Proceedings: Hearsay and Related Topics,* Cm 3670 (1997) para.3.17.

The Criminal Justice Bill (which later became the CJA 2003) was also considered by the Parliamentary Joint Committee on Human Rights. The Committee concluded that the Bill '[contained] a number of significant and worthwhile safeguards against unfairness'.[85] The Committee noted that whilst there was a potential for conflict with the Convention, it was confident that 'trial judges would be able to operate the provisions in a way as to respect Article 6 rights.'[86]

Section 116 of the CJA 2003 defines the circumstances under which the evidence of an absent witness may be admitted at trial. Under section 116(2)(a), the admission in evidence of a statement of a witness who is dead is automatic. This is for the simple reason that in those circumstances it will clearly be impossible for the witness to attend court. However, the evidence of a witness who is absent due to death must still overcome a number of hurdles designed to secure the fairness of the proceedings before it will be admitted.

Under section 116(1)(b) the absent witness must be identified to the court's satisfaction. This safeguard operates to ensure that 'the opposing party is in a position to impugn the credibility'[87] of the witness. Section 124 makes special provision for the admissibility of material which challenges the credibility of an absent witness. These provisions read together give the defendant an opportunity to discredit the maker of the statement, compensating for the lack of opportunity to cross-examine him. Section 125 requires the judge to stop any case depending wholly or partly on hearsay evidence if that evidence is unconvincing to the point where a conviction based upon it would be unsafe. This is a watered down version of the sole or decisive consideration. Perhaps the most important safeguard is 'the power to exclude unfair evidence under s78 of the Police and Criminal Evidence Act 1984 (PACE)'.[88] Furthermore, in all cases where a witness statement is read to the jury, the jury will be warned of the dangers of attaching to much weight to untested evidence. It is submitted that as fair trial issues are 'amongst those the judiciary are most adept at handling',[89] and judges are arguably better qualified than juries to quantify the cogency and weight to be attached to evidence not subject to cross-examination,[90] the discretionary safeguards provide adequate protection for the defendant. It follows that in cases where witnesses are unavailable for reasons other than fear, there are sufficient safeguards in place to ensure fairness and as such, there is no logical reason why such evidence should not be admitted.

[85] Joint Committee on Human Rights, Second Report of Session 2002-2003: *Criminal Justice Bill* HL Paper No.40, HC Paper No.374 (2003) p.29.
[86] Ibid, p.30.
[87] Keane, *The Modern Law of Evidence,* p.289.
[88] Requa, 'Absent Witnesses,' p.214.
[89] Ibid, p.230.
[90] The Diplock Report (1972).

Where the evidence of an absent witness is admitted under the fear category, the defendant is afforded a further safeguard. The statute provides that under these circumstances, the court will only admit the evidence if the interests of justice test provided for by section 116(4) is satisfied. Section 116(4) requires the court to have regard to, inter alia, the statements contents, and; the risk that unfairness to either party would result from the evidence being admitted. The Law Commission recommended the inclusion of this safeguard so as to prevent 'dishonest witnesses [giving] a statement and then [claiming] to be frightened so as to avoid being cross-examined.'[91] In this way, the statute protects the interests of defendants whilst also respecting witnesses' claims to fair treatment.

The result of the application of the statutory safeguards is that defendants such as Al-Khawaja can be safely (and justly) convicted. The success of the statutory provisions is reflected in the 'relatively small number of appellate cases'[92] that have emerged. A further indication of the strength of the English regime is the finding in *Horncastle* that 'the [statutory] safeguards would have precluded convictions in most of the cases where a violation'[93] of Art.6 was found by the ECtHR. In fact, as Lord Chief Justice Judge illustrated in *Horncastle,* a number of cases that had come before the ECtHR would never have made it to trial under English law.[94]

Just as the CJA 2003 affords the defendant sufficient safeguards to counterbalance the detriment that results from a restriction of confrontation rights, the C&JA 2009 ensures that defendants' fair trial rights are respected where the evidence of anonymous witnesses is adduced against them. Under the C&JA 2009, witnesses are only permitted to give evidence anonymously where three conditions are met.

***Condition A*** is that the proposed order is necessary to protect the safety of the witness or a third party, the public interest or to protect against significant damage to property. Section 88(6) requires the court to have regard to any reasonable fear on the part of the witness that any of these consequences may result from the witness being identified. The first important safeguard arises from the case law interpreting this section: the requirement of reasonable fear is a mixed subjective-objective test; the witness must be in fear and must have reasonable grounds for being so.[95] This judicial interpretation of the statute places significant limits on the circumstances in which anonymity will be granted, whilst recognising the fact

[91] Law Commission Report No. 245 para.1.40.
[92] Worthern, 'The hearsay provisions,' p.433.
[93] *Horncastle* [2009] para.92.
[94] Ibid, at Annexe 4; para's.13, 73 and 80.
[95] *R v Powar* [2009] EWCA Crim 594 para.62.

that many witnesses of serious criminal activity will quite justifiably experience fear generated merely by the circumstances of the crime.

***Condition B*** is that the judge must be satisfied that, having regard to all the circumstances, the effect of the order would be consistent with the defendant receiving a fair trial. This provision reflects the earlier assertion that as fair trial issues are amongst those the judiciary is most qualified to handle, 'it is simpler to leave the judge in charge of what constitutes a fair trial.'[96]

***Condition C*** is that witnesses' testimony must be sufficiently important so that it is in the interest of justice for the witness to testify, and; that the witness would not testify without the protection of the proposed order; or, that there would be a real harm to the public interest if the witness were to testify without the proposed order being made. The public interest can quite conceivably be damaged if anonymity is not granted to the undercover police officer who is called to give evidence. It is quite proper for witnesses of this type to be provided for 'given the nature, extent and expense of the training they are required to undertake'[97] and the obvious difficulty in recruiting individuals who are willing to embrace the risks inherent in the job. Without the evidence of undercover police officers, some of the most notorious criminals in history could never have been convicted.[98] It is submitted that a society that is committed to combating organised crime must lend legislative support to these effective investigative methods.

O'Brian suggests that the recent case of *Mayers*[99] casts doubt on the extent to which English courts take confrontation rights seriously. O'Brian claims that the main concern of the Court of Appeal in relation to the conjoined case of *Bahmanzadeh,* a case in which the defendants sought to establish that their Art.6 right had been infringed due to the evidence of undercover test purchase officers being given anonymously, 'was merely one of not blowing the officers' cover so they could continue to do undercover work.'[100] With respect, it is submitted that this interpretation of the judgment is rather cynical. In fact, the overwhelming priority of the Court in *Bahmanzadeh & Costelloe* was ensuring the safeties of both the officers and the defendants involved in the case. With regard to the officers, the court expressed its concern that 'At the most dangerous level, undercover officers who have penetrated criminal associations can face death or very serious injuries'.[101] With regard to

[96] Ormerod et al, 'Coroners and Justice Act', p.380.
[97] Ibid, p.379.
[98] See 'Using Intel to Stop the Mob, Part 3', http://www.fbi.gov/news/stories/2008/march/pistone031308
[99] *R v Mayers* [2008] EWCA Crim 2989.
[100] O'Brian, 'Confrontation,' p.113.
[101] *R v Mayers* [2008] at para.32.

the defendants, the Court explained that '[the appellants'] knowledge of the identity of a number of undercover police officers… might have exposed them to pressure from criminals to provide such information.'[102] The opinions of the Court echo the DPP's sentiments; that anonymity orders should only be granted 'where absolutely necessary'.[103] The author submits that if there can be one circumstance that unequivocally necessitates an order for witness anonymity, it is where the denial of such an order carries a risk of the witness suffering death or serious injury. Contrary to O'Brian's reading of *Mayers,* it is argued that English courts take confrontation and anonymity issues very seriously indeed.

In addition to the heavy burden that must be satisfied in order to meet Conditions A-C, the court *must* have regard to a list of relevant considerations which include, inter alia; the general right of the defendant to know the identity of a witness, whether the evidence given by the witness is the sole or decisive evidence against the accused, and; whether the witnesses' evidence can be properly tested without their identity being disclosed.[104]

The mandatory considerations prescribed by statute are designed to supplement the necessary conditions so as to ensure fairness to the defendant. Whilst the sole or decisive nature of evidence is rightly taken to account in this context, to apply the sole or decisive rule in the way that the ECtHR intended would allow defendants such as those in *Bahmanzadeh* a perverse protection from conviction even where there is a considerable body of cogent evidence of their guilt. This approach, from a practical perspective, is untenable. In every case, section 90 of the C&JA 2009 provides that where a witness anonymity order is in operation, the judge must warn the jury of the dangers of attaching too much weight to untested evidence and instruct them that the mere existence of the order should not prejudice the defendant. A further safeguard under section 91 of the Act affords the judge the power to discharge the order if it appears appropriate to do so. Finally, the Act requires that the witness is never to be concealed from judge and jury, and so anonymity provisions do not adversely affect the ability of fact-finders to assess the demeanour of the anonymous witness. The success of the safeguards is again represented by the paucity of reported appeals[105] which suggests the statute merely lends Parliamentary approval to a process the judiciary were already handling appropriately.

It is therefore submitted that the multitude of safeguards under the 2009 Act are sufficient to counteract the risk that the use of anonymous witness evidence will render the trial unfair.

[102] Ibid, para.86.
[103] *DPP's Guidance on Witness Anonymity* p.60.
http://www.cps.gov.uk/publications/directors_guidance/witness_anonymity.html
[104] Coroners and Justice Act 2009, s89.
[105] Ormerod et al., 'Coroners and Justice Act,' p.372.

The provisions rightly recognise the reality that in some cases, the witness who is denied anonymity will face 'at worst a risk to life, at minimum a loss of respect for privacy.'[106] These concerns are reflected in the views of lay witnesses as expressed in a recent Home Office study of witness satisfaction levels.[107] The findings also suggest that those witnesses who are granted special measures are more likely to be willing to act as a witness in the future, and experience a greater level of satisfaction and confidence in the criminal justice system generally. Of the vulnerable witnesses surveyed 70 per cent either experienced or feared intimidation. This is an overwhelming majority of vulnerable witnesses to which the law should not turn a blind eye. If the 'sole or decisive' test had been adopted by the UKSC, the judiciary would have created a situation in which the CPS would be forced to cajole witnesses into testifying in circumstances that would risk their physical or mental well-being, or risk the collapse of a case against a manifestly guilty defendant.

In light of the criticisms of *Al-Khawaja* advanced in *Horncastle*, the Grand Chamber would either need to provide an irresistibly coercive justification for the rule, or concede some ground to the UKSC.

## 4 *Al-Khawaja* in the Grand Chamber: Conclusions

The judgment of the Grand Chamber at Strasbourg in *Al-Khawaja and Tahery v UK*[108] 'conceded the essential point that the…Supreme Court were making'.[109] The Court recognised that in some cases it is possible for a defendant to receive a fair trial where the main body of prosecution evidence comes from witnesses whom the defence have been unable to question or have questioned. The Court summarised its conclusion as follows:

> Where a hearsay statement is the sole or decisive evidence against a defendant, its admission in evidence will not automatically result in a breach of Article 6… [However] where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny.[110]

The Grand Chamber indicated that Art.6 would therefore not be breached where two conditions were met; the first is that there must be a good reason for the absence of the witness. The Court noted that death and fear were good reasons in principle. The second is that sufficient safeguards are provided to protect against a miscarriage of justice. The Court

[106] Ibid, p.369.
[107] Hamlyn, B., Phelps, A., Turtle, J., Sattar, G., Home Office Research Study 283; *Are special measures working? Evidence from surveys of vulnerable and intimidated* witnesses; (London: Home Office, 2004).
[108] (2012) 54 EHRR 23.
[109] Spencer, J.R., 'Hearsay evidence at Strasbourg: a further skirmish or the final round? A comment on Al-Khawaja and Tahery v UK in the Grand Chamber,' *Archbold Review* (2012), 1, 5-8 at p.6.
[110] *Al-Khawaja* (2012) at para.147.

confirmed that 'the safeguards contained in the [Criminal Justice] Acts, supported by those contained in section 78 of the Police and Criminal Evidence Act… are…strong safeguards designed to ensure fairness'.[111] However, despite its recognition of the utility of the safeguards, the Grand Chamber still found a violation of Art.6 in respect of Tahery, because the evidence of the absent witness in the case could not be considered demonstrably reliable, and no other evidence corroborated it (unlike Al-Khawaja's case). The result of that qualification is that in cases where a defendant is convicted based on the uncorroborated evidence of an absent witness whose reliability is questionable, a successful application to Strasbourg may well be the result. It is submitted that this qualification is perhaps not such a bad thing, but the conflict has not been entirely diverted. The Court of Appeal in *R v Riat*[112] recently suggested that in cases where *Horncastle* and *Al-Khawaja* conflict, English courts should follow the former.

Whilst the UKSC position was vindicated by the Grand Chamber, it must be recognised that there are some attractive reform proposals which, if implemented, would ensure compliance with ECtHR jurisprudence and arguably strike an even more effective balance between the rights of the defendant and witness in a criminal trial. In relation to absent witnesses, the belated implementation of section 28 of the Youth Justice and Criminal Evidence Act 1999 would provide a mechanism for the pre-trial cross-examination of vulnerable witnesses, not unlike the committal hearings of old, whereby defence counsel would have the opportunity to put questions to a witness at an early stage. This is a suggestion with a long pedigree, as Requa observes; 'Pre-trial questioning could address the bind created by flexible hearsay rules and a compressed trial stage and preserve confrontation…rights while respecting the interests and safety of witnesses.'[113] In relation to anonymous witnesses, the UK courts could facilitate closer compliance with the ECtHR by providing for special independent counsel to take an investigative role in proceedings and conduct a cross-examination of a potentially anonymous witness at an ex-parte hearing to determine whether or not an anonymity order should be made.[114] This proposal has garnered support from the Joint Parliamentary Committee on Human Rights.[115] Unfortunately, in a time of legal austerity, as evidenced by the recent cuts to the legal aid budget by virtue of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and an increasing Parliamentary desire to drive

[111] Ibid, at para.151.
[112] [2012] EWCA Crim 1509.
[113] Requa, 'Absent Witnesses,' p.227.
[114] Ormerod et al., 'Coroners and Justice Act 2009,' pp.376-377.
[115] Joint Committee on Human Rights, Twenty-Sixth Report of Session 2007-08, *Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill (2008)* HL Paper No.153, HC Paper No.950 (Session 2007/08) p.3.

down court costs and 'delays',[116] proposals such as these seem unlikely to be implemented in the near future.

Due to the demonstrable practical and conceptual shortcomings inherent in the 'sole or decisive' rule, this author has argued that English law provides sufficient safeguards to render the sole or decisive test unnecessary in relation to both absent and anonymous witnesses. It is submitted that the Supreme Court was right to trenchantly reject the attempt to force the application of the rule in our jurisdiction, and the recent judgment of the Grand Chamber in *Al-Khawaja* lends weight to that assertion. In an ideal world, the UK government would find the finances and inclination to implement the reforms that have been briefly discussed herein and widely advocated elsewhere, but in the absence of that ideal, for the multitude of reasons advanced above, the approach of the UKSC is the right one.

[116]Mr David Blunkett MP, Hansard: HC Debate Vol.395 Col.919 4 December 2002.