HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 4

on appeal from: [2003] EWHC 227 (Admin)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina *v.* Camberwell Green Youth Court (Respondents) *ex parte* D (a minor) (by his mother and litigation friend) (Appellant) (Criminal Appeal from Her Majesty's High Court of Justice)

Regina *v.* Camberwell Green Youth Court (Respondents) *ex parte* Director of Public Prosecutions (Respondent) (G (by his mother and litigation friend) (FC) (Appellant) (Interested Party)) (Criminal Appeal from Her Majesty's High Court of Justice)

ON
THURSDAY 27 JANUARY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

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LORD NICHOLLS OF BIRKENHEAD

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. For the reasons they give, with which I agree, I would dismiss these appeals.

LORD HOFFMANN

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. For the reasons she gives, with which I agree, I would dismiss these appeals.

LORD RODGER OF EARLSFERRY

My Lords,

3. I have had the advantage of reading in draft the speeches to be delivered by my noble and learned friends, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood. I agree with them and would accordingly answer the certified questions as Lady Hale proposes and dismiss the appeals.

4. The provisions of section 21 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act") have the effect that, save in exceptional circumstances, the evidence of witnesses under 17 years of age in relation, inter alia, to sexual offences and crimes involving violence must be given by a live television link and, where available, by a suitable video recording. (For the sake of brevity, I shall refer to these particular measures as "special measures".)

5. As can be seen from section 16(5), the theory underlying these provisions is that the use of the special measures will maximise the quality of the children's evidence in terms of its completeness, coherence and accuracy. To put the point another way, the measures will enable the children to give the best evidence of which they are capable. Both formulations assume that the children are truthful and intend to give accurate evidence. The special measures will then help them to do so by reducing any strain caused either by the formal atmosphere of the court-room or by the presence of the accused. Making the special measures standard for the trial of certain kinds of offences has the additional advantage of allowing these potential witnesses and their parents to be reassured, at an early stage, that they will be able to give their evidence in this way.

6. In an ideal world only honest and reliable witnesses would be called to give evidence in court. Relatively few crimes are committed, however, in front of disinterested, sober, upright members of the public. Therefore, in many trials, especially for crimes of violence, both the prosecution and the defence have to rely on witnesses who are anything but honest and reliable. For example, where the case arises out of a fight between rival gangs of sixteen-year-old youths, the prosecution witnesses will tend to be members of the defeated gang and their equally young supporters. Very often, whether out of misplaced loyalty or as a

result of threats, some, at least, of these witnesses will give deliberately false evidence that is designed to conceal the actual course of events in order to throw the blame on to their opponents, the defendants. The defence witnesses will come from the victorious side and will often have precisely the opposite agenda. In practice, even although under 17 years of age, many witnesses of this kind are only too little affected by the formality of the trial proceedings or by any judicial sanctions which might be imposed for their failure to speak up or for their perjury. And, if they feel threatened, it is not by the mere presence of the defendant(s) in the dock, but by the prospect of being beaten up later if they deviate from the party line. The unenviable task of the jury in such cases is to assess the witnesses and to try to pick out those parts of their evidence that are truthful and reliable. The jury's task is unlikely to be made any less difficult if the use of special measures does indeed have its presumed effect and so makes it that much easier for the dishonest witnesses to give their untruthful account in the most complete and coherent way of which they are capable.

7. Different people may therefore take different views about the wisdom of applying special measures, in the specified cases, across the board to all witnesses who are under 17 years of age. As Lady Hale has explained, however, there is a considerable body of expert opinion which supports the view that, except in special circumstances, the evidence of such witnesses should indeed be taken in that way in all trials for sexual offences or offences involving violence. Recently, in the Vulnerable Witnesses (Scotland) Act 2004, the Scottish Parliament has followed that path and made provision for a system of special measures for taking the evidence of witnesses under 16 years of age in certain cases, but has also prescribed a general rule that in such cases witnesses under 12 years of age should give their evidence away from the court building. Similarly, the 1999 Act gives effect to Parliament's judgment that the benefits to justice from applying special measures to truthful young witnesses outweigh any risks to justice from applying them to untruthful or unreliable young witnesses. That judgment must be respected. I would therefore reject Mr Carter Stephenson QC's argument that a court, which has to make a special measures direction by virtue of 21(3), can immediately discharge or vary that direction under section 20(2)(b) on the view that, having regard to the nature of the case or the age of the defendant, it would not be in the interests of justice to make such a direction. That interpretation of section 20(2)(b) would frustrate the policy of the legislation. Section 20(2)(b) should be interpreted, rather, as catering for the (unusual) situation where, between the making of the direction and the trial, some particular circumstance emerges which would make it impossible or inappropriate to proceed on

the basis of the direction. Sections 24(3) and 27(7) give the court powers to deal with any problems which may emerge at the trial.

8. Mr Starmer QC submitted that article 6(3)(d) of the European Convention on Human Rights, gives the defendant in a criminal trial a right to confront his accusers, to look them in the eye while they are giving their evidence. That right might have to yield if, in any given case, it could be shown that the child witness would not be able to give his or her evidence satisfactorily in open court in the presence of the defendant. But section 21(5), which excluded any such individualised consideration, made the system incompatible with article 6(3)(d). Mr Carter Stephenson adopted this submission.

9. According to the popular image, in a British criminal trial witnesses give evidence before a robed judge and a jury and they are examined and cross-examined by bewigged counsel for the Crown and for the defence. Inevitably, that image is over-simplified. The vast majority of trials take place before magistrates; the representatives of both sides may be solicitors rather than counsel and, in exceptional cases, in England - but not in Scotland – even trials for serious offences may proceed in the absence of the accused. Where children are involved, in the Crown Court wigs and gowns are discarded and various other steps are taken to make the proceedings less formal. In the Youth Court the proceedings are always relatively informal, being tailored to the requirements of the children who appear there. Historically, also, the popular image does not tell the whole story. For centuries, in England the parties in a criminal trial usually had no professional representation. The prosecutor and his witnesses would put their side of the story and the accused would try to discredit it. In that world, cross-examination and formal rules of evidence were unknown: they are the products of the adversarial form of trial that emerged when, in the course of the eighteenth and early nineteenth centuries, it became common for counsel to be instructed. Since the forms of trial have evolved in this way over the centuries, there is no reason to suppose that today's norm represents the ultimate state of perfection or that the procedures will not evolve further, as technology advances. The special measures in these cases are indeed examples of modifications which have been made possible by advances in technology.

10. It is nevertheless fair to say that under the systems of criminal procedure used in Britain today it is usual for witnesses to give their evidence in open court in the presence of the accused. That form of trial is often contrasted with a Continental form of criminal proceedings

where judges rather than juries determine guilt, on the basis of their free appreciation of a file of evidence compiled by an investigating judge, and where, if witnesses are questioned at trial, the questions are put by the judge rather than by the prosecution and defence lawyers. Again, the counter-image is over-simplified, since the Continental systems vary considerably from country to country and within countries. It is, however, sufficiently accurate to make one anticipate that the introduction of article 6(3)(d) will not have added anything of significance to any requirements of English law for witnesses to give their evidence in the presence of the accused.

11. An examination of the case law of the European Court of Human Rights tends to confirm that much of the impact of article 6(3)(d) has been on the procedures of Continental systems which previously allowed an accused person to be convicted on the basis of evidence from witnesses whom he had not had an opportunity to challenge. For instance, in *Unterpertinger v Austria* (1986) 13 EHRR 175 the defendant was convicted of causing actual bodily harm, mainly on the basis of statements which his wife and daughter had given to the police. His wife and daughter took advantage of their right not to give evidence at his trial and so could not be cross-examined on their statements. In these circumstances the European Court of Human Rights held that there had been a breach of article 6(3)(d) since the defendant had not had an opportunity, at any stage in the earlier proceedings, to question the persons whose statements were read out at the hearing. Similarly, in *Kostovski v Netherlands* (1989) 12 EHRR 434 the Court found that there had been a violation of article 6(3)(d) where a Dutch court treated the statements of anonymous witnesses, who had been examined in the absence of the accused and his representatives, as sufficient proof of guilt of armed robbery. The Court explained its approach in this way, at pp 447 - 448, para 41:

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

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

In *Van Mechelen v Netherlands* (1997) 25 EHRR 647 a Dutch court had convicted the applicants of attempted manslaughter and robbery on the basis of statements made, before their trial, by anonymous police officers, none of whom gave evidence before the Regional Court or the investigating judge. The Court of Appeal referred the case to the investigating judge who arranged hearings in which he, a registrar and the anonymous witnesses were in one room, while the applicants, their lawyers and the Advocate General were in another room. The two rooms were connected by a sound link only. By a majority, the European Court held, at p 674, para 59, that there had been a breach of article 6(3)(d) since the defence were not only unaware of the identity of the police witnesses but were also prevented from observing their demeanour under direct questioning, and thus from testing their reliability. It had not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered. It seems clear, however, that, if the two rooms had been connected by a video link, which had allowed the applicants and their representatives to observe the demeanour of the witnesses under questioning, this would have gone a long way, at the very least, to meeting the requirements of article 6(3)(d).

12. By its very nature, the normal trial procedure in this country ensures that an accused can challenge and question the witnesses against him. That is one of its perceived virtues. And one of the aims of the Sixth Amendment to the United States Constitution, which guarantees the defendant in a criminal trial the right "to be confronted with the witnesses against him", is indeed to make sure that the witnesses will be subject to cross-examination. Therefore, where the witness is available for cross-examination at trial, the Sixth Amendment places no restraint on the use of any pre-trial statement which he may have made. So, in *California v Green* (1970) 399 US 149, the Supreme Court held that there was no violation of the Sixth Amendment when the defendant was convicted of supplying marijuana on the basis of pre-trial statements of a witness who gave evidence at the trial and who was subject to full and effective cross-examination. The Court expressly reaffirmed this ruling in *Crawford v Washington* (2004) 541 US 36 per Scalia J, Slip Opinion, at p 24, footnote 9. This approach differs in one particular respect from the one adopted by the European Court of Human Rights in *Kostovski v Netherlands* (1989) 12 EHRR 434, 447 – 448, para 41 quoted above.

The critical element for the European Court is that the defence should have an adequate and proper opportunity to challenge and question a witness on his statement at some stage. The requirements of the Convention are satisfied even if that opportunity is afforded before trial. The Sixth Amendment is somewhat stricter, however, since it requires that the witness should be available for cross-examination at the trial. That is, of course, what happens under the 1999 Act.

13. Mr Starmer drew on another important strand in the case law on the Sixth Amendment as support for his argument that the normal form of trial in Britain is also designed to give effect to a right of any defendant to be confronted with the witnesses against him and to look them in the eye while they are giving evidence. That right was valuable because, human nature being what it is, witnesses were likely to feel differently if they had to repeat their story looking at the man whom they would harm greatly by distorting or mistaking the facts. This line of thought is expounded in the opinion of Scalia J, writing for the Supreme Court, in *Coy v Iowa* (1988) 487 US 1012, 1016 – 1020. More recently, in *Crawford v Washington* Scalia J, again giving the opinion of the Court, went into the historical background to the Sixth Amendment. On that basis he held, Slip Opinion, at p 14, that the principal evil against which it was directed "was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Hence it was aimed at an accuser who made a formal statement to government officers. Doubtless, therefore, it would cover a child witness who gave evidence in a memorandum video recording.

14. It is for the people of the United States, and not for your Lordships, to debate the virtues of the Sixth Amendment in today's world. It overlaps, to some extent, with article 6(3)(d) of the Convention as interpreted by the European Court. But, as interpreted by the Supreme Court, the Sixth Amendment appears to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused. For my part, I would certainly not disparage the thinking behind that requirement. But, whatever its merits, this line of thought never gave rise to a corresponding requirement in English law. That is amply demonstrated by the very brevity of the decision of the Court of Criminal Appeal in *Smellie* (1919) 14 Cr App R 128, holding that a judge could remove the accused from the sight of a witness whom his presence might intimidate.

15. Nor has article 6(3)(d) of the Convention been interpreted as guaranteeing the accused a right to be in the same room as the witness giving evidence. What matters, as *Kostovski v Netherlands* shows, is that the defence should have a proper opportunity to challenge and question the witnesses against the accused. The decision of the European Commission of Human Rights in *Hols v Netherlands* Application no 25206/94, 19 October 1996, and the judgment of the Court in *SN v Sweden* Application no 34209/96, 2 July 2002, confirm that these requirements can be satisfied even where, for good reason, the accused is not physically present at the questioning. Here the good reason is to further the interests of justice by adopting a system that will assist truthful child witnesses to give their evidence to the best of their ability. The introduction of article 6(3)(d) into English domestic law has therefore not altered the position in this regard. The 1999 Act satisfies the requirements of article 6(3)(d). Mr Starmer's first challenge to its provisions must therefore be rejected.

16. The other submission advanced by Mr Starmer and adopted by Mr Carter Stephenson was that, by requiring the evidence of child witnesses to be given by video recording and/or video link, while not affording a similar facility to child defendants, the provisions of the 1999 Act violated these defendants' article 6(1) Convention right to equality of arms. As a general rule, however, a provision that is designed to allow truthful witnesses for both sides to give their evidence to the best of their ability cannot make a trial unfair, simply because there is no corresponding provision designed to allow a truthful defendant to give his evidence to the best of his ability. The facts that the defendant does not need to give evidence, and that he has a legal representative to assist him if he chooses to do so, have hitherto been regarded as adequate arguments against the need to make such provision for child defendants in England and Wales. Certain practical difficulties have also been prayed in aid of this stance. It is worth noticing, however, that, when the Vulnerable Witnesses (Scotland) Act 2004 comes into force, under section 271F(2) – (8) of the Criminal Procedure (Scotland) Act 1995 children who give evidence as accused persons will, for the most part, be treated in the same way as other children who are witnesses. So there are no insuperable difficulties in the way of taking some such step.

17. The fact remains, however, that the 1999 Act does not treat child defendants in this way. But, equally, it does not affect any power of the court, in the exercise of its inherent jurisdiction, to make an order, or to give leave, of any description in relation to such defendants who are witnesses: section 19(6), read along with section 17(1). It would be

inappropriate for the House in this case to determine the scope of any such power to ensure a fair trial where, for example, a child defendant's ability to give evidence satisfactorily was impaired because of the behaviour of a co-defendant, or of a witness or of their associates or of the members of their families. (Cf section 271F(1)(b) to be inserted into the Criminal Procedure (Scotland) Act 1995.) Only if this power should prove to be inadequate in any given case might the defendant's trial be rendered unfair, with the result that there would be a breach of article 6(1).

BARONESS HALE OF RICHMOND

My Lords,

18. The issue before us is whether the new scheme providing for how child witnesses are to give their evidence in criminal cases is compatible with the right of the defendant to a fair trial under article 6 of the European Convention on Human Rights, in particular when that defendant is also a child. The question certified for us by the Divisional Court was this:

> "Are the provisions of section 21(5) of the Youth Justice and Criminal Evidence Act 1999 compliant with Article 6 of the European Convention on Human Rights insofar as they prevent individualised consideration of the necessity for a special measures direction at the stage at which the direction is made?"

19. It is necessary, therefore, to explain how section 21(5) fits into the scheme for "special measures directions in the case of vulnerable and intimidated witnesses", set up by Chapter I of Part II to the Youth Justice and Criminal Evidence Act 1999. This followed from *Speaking Up for Justice, Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office, 1998). This is turn followed a Council of Europe Recommendation No R(97)13, *Intimidation of witnesses and the rights of the defence,* adopted on 10 September 1997. The new scheme built upon and expanded earlier tentative steps taken both by the common law and statute to enable children to give evidence in criminal trials:

removing the accused from the sight though not the hearing of a witness (*R v Smellie* (1919) 14 Cr App R 128); setting up screens to prevent the witness seeing or being seen from the dock (*R v X, Y and Z* (1990) 91 Cr App R 36); allowing a child to give evidence by live television link (Criminal Justice Act 1988, s 32); and admitting a video recorded interview as the child's evidence in chief (Criminal Justice Act 1988, section 32A, inserted by the Criminal Justice Act 1991, s 54). The aim of the special measures is to assist vulnerable or intimidated witnesses who might otherwise be unwilling to come forward at all or unable to give the best evidence of which they are capable.

The legislation

20. Section 16(1)(a) provides that all children under 17 at the time of the directions hearing are eligible for assistance. Section 16(1)(b) and (2) deal with mentally or physically disordered or disabled witnesses and section 17 deals with witnesses whose evidence is likely to be affected by fear or distress. Under section 18(1)(a), seven special measures are potentially available to help children and disabled witnesses: screens to prevent them seeing the accused (section 23); giving evidence by means of a live television link (section 24); giving evidence in private (section 25); removing wigs or gowns (section 26); admitting a video-recorded interview as their evidence in chief (section 27); admitting a video recording of cross-examination and re-examination (section 28 – but this has not been brought into force); examination through an intermediary (section 29); and devices to aid the communication of questions and answers to and by a disabled witness (section 30). All except the last two are available to help witnesses who are in fear or distress (see section 18(1)(b)). None of these measures is available unless the Secretary of State has notified the court that arrangements are in place locally for implementing them (see section 18(2), (3)).

21. All witnesses, whether for the prosecution or defence, may be eligible for assistance except for the accused (see sections 16(1) and 17(1)). Any party may make an application for a special measures direction or the court may raise the issue of its own motion (section 19(1)). For most witnesses, the court has first to determine whether the witness is eligible, then whether any of the special measures would be "likely to improve the quality" of her evidence, and if it would, which measures to direct (section 19(2)).

22. For child witnesses, however, there is a special regime applying to two of the special measures, video-recorded interviews and live link. If the witness is a child, the court must first have regard to the principles set out in section 21(3) to (7). If these require either or both of these special measures to be applied, the court must assume that they will be likely to maximise the quality of the child's evidence (see section 21(2)). Section 21(3) to (5) read as follows (section 21(6) and (7) deal with video-recorded cross examination):

> "(3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements:-
>
> (a) it must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and
>
> (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 24.
>
> (4) The primary rule is subject to the following limitations:-
>
> (a) the requirement contained in subsection (3)(a) or (b) has effect subject to the availability (within the meaning of section 18(2)) of the special measure in question in relation to the witness;
>
> (b) the requirement contained in subsection (3)(a) also has effect subject to section 27(2); and
>
> (c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).
>
> (5) However, subsection (4)(c) does not apply in relation to a child witness in need of special protection."

23. A child witness is "in need of special protection" if the offence to which the proceedings relate is a sexual offence under various listed statutes, kidnapping, false imprisonment or child abduction, cruelty to a child, or any offence "which involves an assault on, or injury or threat of injury to, any person" (see section 35(3)).

24. Thus the presumption is that all child witnesses give their evidence in chief by means of a video-recorded interview (which has been conducted for that purpose, see section 21(1)(c)), if there is one. The court does, however, have a discretion to refuse to admit the video or part of it under section 27(2). This reads:

> "(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted under this section if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted."

25. It is common ground that this discretion can be exercised at the preliminary hearing where special measures are first considered. The Home Office and other interested Departments have published guidance on how these interviews are to be conducted: see *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children* (2001), Chapter 2, revising and expanding upon the earlier *Memorandum of Good Practice on Video Recorded Interviews for Child Witnesses in Criminal Proceedings* (1992). These interviews are not conducted in the same way as an ordinary examination in chief. Every attempt is made to put the child at her ease and to enable her to speak freely about what has happened. Hence, there may be criticisms of the way in which the interview was conducted or it may contain inadmissible or prejudicial material which should be excluded. In considering whether any part of a recording should not be admitted, the court has to consider whether any prejudice to the accused is outweighed by the desirability of showing the whole, or substantially the whole of the interview (section 27(3)). In reality, the defence may be more than willing for an unsatisfactory interview to be admitted.

26. The presumption also is that all child witnesses will give the rest or the whole of their evidence by live link, if it is available (section 21(4)(a)). This is not subject to a discretion comparable to that in section

27(2). This is not surprising, as the only difference between giving evidence by live link and giving evidence in the normal way is that the witness is not physically present in the court room. She can still be seen and heard, often at closer range than in many courtrooms. The definition of live link is in section 24(8):

> "(8) In this Chapter "live link" means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in section 23(2)(a) to (c)."

27. The "persons specified" are the judge or justices (or both) and the jury (if there is one); legal representatives acting in the proceedings; and any interpreter or other person appointed to assist the witness. They do not include the accused (for the unfortunate reason that the list is taken from that referring to the use of screens, the whole purpose of which is to prevent the witness seeing and being seen by the accused). But this is not an exclusive definition. If the accused is in the courtroom, the court would and normally should, in the exercise of its power to ensure a fair trial, arrange matters so that he can see the witness too.

28. In cases where the child is *not* "in need of special protection", that is where the offences do *not* involve sex, kidnapping, cruelty or violence, the court may also disapply the rule in favour of video recording and live link, if it is satisfied that it "would not be likely to maximise the quality of the [child's] evidence" (section 21(4)(c)). In cases where the child *is* in need of special protection, however, the court has no power to disapply the rule for that reason (section 21(5)). The irrebuttable presumption is that in all proceedings for offences of a sexual or violent nature, giving evidence in this way is likely to enable the child to give her best quality evidence.

29. All of this will be considered at the preliminary hearing when special measures are first raised (unless it is uncontested, in which case a hearing may be dispensed with, s 20(6)). Once made, a direction is intended to be binding until the proceedings are completed. This was a crucial feature of the scheme recommended in *Speaking Up for Justice*, para 2.2:

> "The Working Group proposes a scheme which would involve the identification of a vulnerable or intimidated witness and their needs at an early stage in the police investigation. This would enable decisions to be taken on appropriate methods of interview and investigation and ensure that there is appropriate pre-trial preparation. The prosecution and defence would be able to apply to the court for special measures to be made available to assist the witness during the trial. Decisions on the measures to be used would be made by the court at a pre-trial hearing and this would be binding so as to ensure that the witness knows in advance of the trial what assistance s/he will be receiving, including the way in which they will be giving their evidence."

30. Hence section 20(1) provides:

> "(1) Subject to subsection (2) and section 21(8), a special measures direction has binding effect from the time it is made until the proceedings for the purpose of which it is made are either:-
>
> (a) determined (by acquittal, conviction or otherwise), or
>
> (b) abandoned,
>
> in relation to the accused or (if there is more than one) in relation to each of the accused."

31. Section 21(8) does not (yet) apply to this case. It provides that a special measures direction for a child witness ceases automatically once the child reaches 17, unless she has already begun to give evidence or the direction has provided for the admission of a video-recording.

32. Section 20(2), however, gives power to discharge or vary the direction in certain circumstances:

> "(2) The court may discharge or vary (or further vary) a special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either:-

(a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion."

33. It would be irrational for a court to make a special measures direction which it was bound to make because of the rules applying to child witnesses and then immediately to vary or discharge it in the interests of justice. Section 20(2) must be contemplating a time after the special measures direction has been made, perhaps at the trial or perhaps at some intermediate stage. It is unlikely to arise much, if at all, in relation to the two special measures with which we are concerned, because both may be disapplied by the trial judge or magistrates in the interests of justice.

34. Thus, once a live link direction has been given, section 24(2) provides that the witness cannot give evidence in any other way without the permission of the court. But section 24(3) provides:

"(3) The court may give permission for the purposes of subsection (2) if it appears to the court to be in the interests of justice to do so, and may do so either-

(a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time, or

(b) of its own motion."

35. Again, this must contemplate a time after the live link direction has been made. Usually it will be at the trial, for example where the machinery is not working properly or where the child is sliding down so as to be invisible to the camera. Another possibility might be where the child was positively anxious to give evidence in the courtroom and the court considered that it would be contrary to the interests of justice to require her to use the live link.

36. Where a video recording is admitted under section 27, the witness may not give evidence in chief in any other way on any matter

which has been adequately dealt with in the recording or without the permission of the court on any matter dealt with (but less than adequately) in that testimony (section 27(5)(b)). The court may give that permission in the same circumstances as those set out in section 24(3) for live link (section 27(7)).

37. But such departures from the primary rules are clearly intended to be exceptional. The earlier powers in sections 32 and 32A of the Criminal Justice Act 1988 were exceptions to the normal practice of giving evidence in the court room, for which in the case of live link an individual case had to be made each time (see *R (Director of Public Prosecutions) v Redbridge Youth Court* [2001] 1 WLR 2403, 2413, para 17). By contrast, the 1999 Act provides that the normal procedure for taking the evidence of child witnesses is to be by video recording and live link.

38. The benefits of this are many. Mr Carter Stephenson, on behalf of the appellant G, acknowledges that a video-recorded interview is likely to be the best evidence that a child can give. It can take place close to the events in question when the recollection is fresh in the child's mind. It is done in an informal setting where every effort is made to make the child feel comfortable and able to speak freely. It is conducted by professionals who are specially trained in questioning children, first to establish that they understand the importance of telling the truth and then to elicit their story as fully as possible in language the child understands but without suggestion or leading questions. But this is obviously not appropriate where the child herself might be charged with an offence; she should be interviewed under the Police and Criminal Evidence Act 1984 (PACE) in the usual way.

39. Whether the direction is for a video recording or only for live link, the child and everyone else knows the position from an early stage. The child can be reassured that she will not have to go into the court room. This is not only reassuring for the witness, but may encourage other child witnesses to come forward or reduce their parents' reluctance to allow them to do so. It is also carries no implicit disparagement of the accused. If all child witnesses give their evidence in this way, there is no suggestion that this is an exceptional case in which the child requires special protection from the accused.

These proceedings

40. In the cases before us the making of a special measures direction was opposed at the outset. In the case of D (and in the associated cases of R and N), justices in the Youth Court ordered that the evidence of child witnesses then aged 13 or 14 be given by live link in prosecutions for robbery of child defendants then aged 14, 16 and 15 respectively. The justices were advised by their clerks that the effect of section 21(5) (see para 28 earlier) was that they had no discretion. The accused applied for judicial review.

41. In the case of G (and of I and AE associated with it) District Judges in the Youth Court declined to make special measures directions in respect of witnesses then aged 12, 16 and 15 in prosecutions for robbery or assault of child defendants then aged 14, 16 and 15. The special measures in question were live link and, in the case of G, a video-recorded interview of the witness O, who was 11 at the time of the events giving rise to the charge. According to the written reasons later given by District Judge Black, the directions were refused because of the inequality of arms between the prosecution and the defence where both the prosecution witnesses and the accused were children, but the accused children did not qualify for special measures. The Director of Public Prosecutions applied for judicial review.

42. A Divisional Court consisting of Rose LJ and Henriques J held that there was nothing in article 6 which prohibited a vulnerable witness from giving evidence in a different room from the accused, nor could a live link or a video recording infringe the right to examine witnesses guaranteed by article 6(3)(d). Accordingly they dismissed the applications of D, R and N and allowed the applications of the Director of Public Prosecutions in the cases of G, I and AE. They certified the question of law set out in paragraph 18 earlier.

43. There were three strands in the arguments presented by the appellants: first the limited power to disapply the primary rule in the interests of justice; second, the procedural requirements of a fair trial under article 6 of the European Convention on Human Rights; and third the "equality of arms" principle also derived from article 6.

Disapplying the primary rule

44. First, Mr Starmer on behalf of D conceded that it was permissible for there to be a statutory presumption in favour of these special measures for child witnesses. His concern was with the limited opportunities for displacing them in the interests of justice. He accepted, indeed it was crucial to his argument, that the power to vary or discharge a special measures direction in section 20(2) could not be used at the time when the direction was made. Further, as a party could only apply for a variation or discharge if there had been a change in the circumstances, he argued that the court could only vary or discharge the direction if there had been such a change. The power in section 24(3) to permit a witness to give evidence other than by live link is in the same terms. Hence, he argued, the court was unable to disapply the primary rule if there was a risk of injustice which was apparent at the outset.

45. It is clear that, by enacting the primary rule and limiting the circumstances in which it may be disapplied, Parliament did not mean to allow defendants to challenge the use of a video recording or live link simply because it is a departure from the normal procedure in criminal trials. There is no question, as there was for live link applications under the old law, of the court striking a balance between the "right of the defendant to have a hearing in accordance with the norm" and "the interests not only of the child witness but also of justice, to ensure that the witness will be able to give evidence and give evidence unaffected by the stress of appearing in court itself" (see *Redbridge*, para 17). Parliament has decided what is to be the norm when child witnesses give evidence. Hence there will have to be a special reason for departing from it. The fact that there is no particular reason to think that this particular child will be upset, traumatised or intimidated by giving evidence in court does not make it unjust for her to give it by live link and video if there is one (cf *Redbridge*, para 16).

46. It is very difficult, and counsel found it difficult, to think of reasons which might make a live link or the admission of a recording unjust which were unrelated either to the quality of the equipment on the day, to the content and quality of the video recording, or the unavailability of the recorded witness for cross-examination (express power to exclude the video recording in these circumstances is preserved by section 27(4)). He gave the example of an assault charge in which the defence was self defence, where it might be important to see the witness in person and gain an impression of how threatening he could be, especially when angry. This is exactly the sort of question

which should be considered only at the trial and not at any preliminary hearing. Only then will the court be able to judge whether there is a real risk of injustice if the fact finders are not allowed to see the witness in the flesh. Even if there is, there are several ways of counter-acting it, for example by bringing the witness into the courtroom after he has given his evidence. But there is nothing in section 20(2) or, more to the point, in section 24(3) to prevent the judge or magistrates trying the case considering the matter and taking whatever action is needed to secure a fair trial on the day. The object of requiring a change in circumstances before a party may apply is simply to avoid repeated attempts to revisit the issue. The court is there to see justice done on the day. But the court must always start from the statutory presumption that there is nothing intrinsically unfair in children giving their evidence in this way.

The procedural requirements of article 6

47. Second, therefore, it is argued that this approach is contrary to the defendant's right to a fair trial guaranteed by article 6 of the European Convention on Human Rights. The relevant parts read as follows:

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

48. The European Court of Human Rights has considered this in a series of cases dealing with anonymous prosecution witnesses. It has enunciated the basic principles time and again, most conveniently in *Kostovski v Netherlands* (1989) 12 EHRR 434, 447-8:

> "39. It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them. . .

> 41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected.
>
> As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."

49. It is difficult to see anything in the provisions of the 1999 Act with which we are concerned which is inconsistent with these principles. All the evidence is produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused can see and hear it all. The accused has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is a face to face confrontation, but the appellants accept that the Convention does not guarantee a right to face to face confrontation. This case is completely different from the case of anonymous witnesses. Even then the Strasbourg Court has accepted that exceptions may be made, provided that sufficient steps are taken to counter-balance the handicaps under which the defence laboured and a conviction is not based solely or decisively on anonymous statements (see *Doorson v Netherlands* (1996) 22 EHRR 330, 350, para 72; *Van Mechelen v Netherlands* (1997) 25 EHRR 647, 673, paras 54, 55; *Visser v Netherlands,* Application No 26668/95, Judgment 14 February 2002, para 43).

50. Our attention has been drawn to only two cases in which measures similar to those in question here were considered. One was a live link transmission where both counsel were in the room with the witness while the judge and accused remained in the courtroom. The application was declared inadmissible (see *Hols v Netherlands*, Application no 25206/94, Commission decision, 19 October 1995). Another was a video-recording of an interview conducted by a police officer with the child complainant, and an audio-recording of a second interview conducted by the same police officer, putting questions which he had been asked by the accused's counsel to put. Despite the fact that counsel had had no opportunity to question the child directly, no

violation of article 6(3)(d) was found (see *S.N. v Sweden*, Application No 34209/96, Judgment, 2 July 2002). The Court reiterated "that evidence obtained from a witness under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care"; but it was satisfied that the national court had done just that (*ibid*, para 53).

51. The measures with which we are concerned do give the accused the opportunity of challenging the witness directly at the time when the trial is taking place. The court also has the opportunity to scrutinise the video-recorded interview at the outset and exclude all or part of it. At the trial, it has the fall-back of allowing the witness to give evidence in the court room or to expand upon the video recording if the interests of justice require this. There is nothing in the case law cited to suggest that this procedure violates the rights of the accused under article 6.

52. Mr Starmer stressed that the Strasbourg case law should be seen in the light of the traditions of our domestic legal system. The nature of criminal proceedings in each contracting State affects the European Court's approach to the basic principle that "all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument." In our system the starting point is that all the evidence is given literally in the court room in front of the accused. Thus any departure should be shown to be necessary.

53. However, this cannot mean that the Strasbourg Court would regard our domestic legal system as so set in stone that Parliament is not entitled to modify or adapt it to meet modern conditions, provided that those adaptations comply with the essential requirements of article 6. In this case, the modification is simply the use of modern equipment to put the best evidence before the court while preserving the essential rights of the accused to know and to challenge all the evidence against him. There are excellent policy reasons for doing this. Parliament having decided that this is justified, the domestic legal system is entitled to adopt the general practice without the need to show special justification in every case.

Equality of arms

54. Thirdly, the appellants argue that it is unfair to the child defendants in these cases if they are denied the same opportunity to give

their evidence under the conditions which are now presumed to produce the best evidence from other child witnesses. This was the argument which impressed the District Judges in the cases of G, I and AE. The scheme of the 1999 Act has attracted academic criticism in this respect. Thus, Professor Birch, in her commentary on the *Redbridge* case [2001] Crim LR 473, 477:

> "It is really something of a farce that in proceedings concerning, say, a fight between gangs of boys in which one 'side' ends up in the dock and the other in the witness box, only the latter are deemed to benefit from the live-link. Perhaps, then, the real prejudice identified in these cases is not that the court or accused is deprived of witnessing demeanour at first hand, but that the accused is deprived of the chance to compete on even terms, and the court of the chance of supervising an equal contest."

55. To similar effect is Laura Hoyano, "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?" [2001] Crim LR 948, 968:

> "If we value the presumption of innocence and the premise that the search for truth demands that witnesses give their best evidence and are fairly tested in cross-examination, then the case for withholding special measures from children accused of crimes must be made, not assumed."

56. Mr Carter Stephenson was concerned that we should understand the realities of life in the Youth Court. The child defendants appearing there are often amongst the most disadvantaged and the least able to give a good account of themselves. They lack the support and guidance of responsible parents. They lack the support of the local social services authority. They lack basic educational and literacy skills. They lack emotional and social maturity. They often have the experience of violence or other abuse within the home. Increasing numbers are being committed for trial in the Crown Court where these disadvantages will be even more disabling.

57. These are very real problems. But the answer to them cannot be to deprive the court of the best evidence available from other child

witnesses merely because the 1999 Act scheme does not apply to the accused. That would be to have the worst of all possible worlds. Rather, the question is what, if anything, the court needs to do to ensure that the defendant is not at a substantial disadvantage compared with the prosecution and any other defendants (see *Delcourt v Belgium* (1970) 1 EHRR 355, para 28). That can only be judged on a case by case basis at trial and on appeal.

58. The defendant is excluded from the statutory scheme because it is clearly inappropriate to apply the whole scheme to him. There are obvious difficulties about admitting a video recorded interview as his evidence in chief, referred to by the Court of Appeal in *R v S.H.* [2003] EWCA Crim 1208, 28 March 2003, paras 23 and 24. Who would conduct it and how? What safeguards against repeated interviews could there be given, that it would not be made available to the other side before the trial? There are also obvious difficulties about applying binding advance presumptions about how his evidence is to be given, if indeed it is to be given at all, when the defence is ordinarily free to make such decisions in the light of events as they unfold. Further, the special measures designed to shield a vulnerable or intimidated witness from the accused would not normally be applicable to a defendant witness.

59. But the Court of Appeal also made it clear in *R v S.H.* that the court has wide and flexible inherent powers to ensure that the accused receives a fair trial, and this includes a fair opportunity of giving the best evidence he can. In that case the defendant had learning and communication difficulties. The court could allow him the equivalent of an interpreter to assist with communication, a detailed written statement could be read to the jury so that they knew what he wanted to say, and he might even be asked leading questions based upon that document, all in an attempt to enable him to give a proper and coherent account.

60. The Strasbourg Court has also held, in *V v United Kingdom* (1999) 30 EHRR 121, 179, para 86 that

> "it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings".

61. The environment and procedures in the Youth Court are already designed with this in mind, although no doubt there will be a need to do more in some cases. The procedures in the Crown Court have also been modified to meet the needs of child defendants following the case of *V v United Kingdom,* and again more may need to be done in some cases.

62. Section 19(6) of the 1999 Act expressly provides that:

> "Nothing in this Chapter is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise) – (a) in relation to a witness who is not an eligible witness, . . ."

63. Clearly, therefore, if there are steps which the court can take in the exercise of its inherent powers to assist the defendant to give his best quality evidence, the 1999 Act does not exclude this. However, in *R (S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), 31 March 2004, the Administrative Court held that there was no inherent power to allow a defendant to give evidence by live link, on the ground that Parliament had sought since 1988 to provide exclusively for the circumstances in which live link might be used in a criminal trial. With respect, while it is true that section 32 of the 1988 Act did not contain an express saving for any inherent power the court might have to assist the accused, section 19(6) makes it clear that the 1999 Act does not purport to make exclusive provision for any of the special measures it prescribes. The point does not arise for decision in this case, and so it would be unwise to express an opinion upon it. It is in any event better taken on an appeal against conviction in which the defendant argues that he was not given a proper opportunity to defend himself. For the reasons given earlier, the situations of defendants and other witnesses are so different that it would only very rarely be necessary for a defendant to give evidence by live link, but the case of a younger child defendant who was too scared to give evidence in the presence of her co-accused might be an example. I would therefore prefer to reserve my position on whether the *Waltham Forest* case was correctly decided. It cannot in any event affect the result of this case. The fact that the accused may need assistance to give his best evidence cannot justify excluding the best evidence of others.

64. I would therefore answer the certified question in the affirmative and dismiss these appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

65. The Youth Justice and Criminal Evidence Act 1999 deals differently with three categories of witnesses eligible for assistance by way of the special measures provided for in sections 24 and 27, provisions respectively for live link evidence and video recorded evidence in chief. One category is witnesses aged 17 or more with regard to whom there are no presumptions either way. In their case the court must determine whether these special measures would be "likely to maximise" (section 19(2)(b)(i)) the "quality [of their evidence] in terms of completeness, coherence and accuracy" (section 16(5)) having regard to all the circumstances of the case including in particular whether it "might tend to inhibit such evidence being effectively tested" (section 19(3)(b)).

66. The second category is child witnesses (witnesses under 17) *not* deemed to be "in need of special protection", ie child witnesses in proceedings which do not involve offences of sex or violence. As to these there is a presumption that these two special measures will be "likely to maximise" the quality of their evidence (section 21(2)) but the presumption is rebuttable: it is open to a party to seek to satisfy the court to the contrary (section 21(4)(c)).

67. The third category is child witnesses deemed to be in need of protection (who may, of course, be witnesses for the prosecution or for the defence and who may or may not themselves be the victims of the alleged offences of sex or violence). For these witnesses the presumption that these two special measures will be likely to maximise the quality of their evidence is irrebuttable. In their case section 21(5) disapplies section 21(4)(c) which itself in category two cases disapplies the primary rule that these two special measures must always be directed in the case of child witnesses. It is, of course, this third category of witnesses with which this appeal is directly concerned.

68. Although I share Lady Hale's view that there will be very few cases when it will be disadvantageous to the defendant for a child witness to give evidence by way of video recording and/or live link, it seems to be that just occasionally this will be so. Indeed, to my mind this is implicit in the legislation. Why otherwise is provision made in

section 21(4)(c) for the possibility of satisfying the court that the quality of the child witness's evidence will *not* be likely to be maximised by these measures, perhaps because they "might tend to inhibit such evidence being effectively tested"? It by no means follows, however, that the legislation is in any way defective or incompatible with article 6 of the European Convention on Human Rights.

69. If in a particular category three case the mandatory special measures direction for live link evidence were to be regarded at the trial as having created a real risk of injustice to the defendant, the court has ample power under section 20(2) to discharge the direction, alternatively, under section 24(3), notwithstanding the direction, to allow the witness to give evidence in open court. (If the risk of injustice were perceived in a video recording case, of course, the court would probably not have made the direction in the first place: such an order would not in those circumstances be mandatory (see sections 21(4)(b) and 27(2)). The number of cases, however, in which the court will conclude that a live link order, mandatorily made at the initial direction stage, would create injustice for the defendant, will be exceedingly small. I reject the appellant's argument that, because the court will be exercising its discretion and reaching a judgment for the first time at trial, the assurance which the witness seeks is, on this approach to the legislation, delayed by the mandatory requirement to make the direction at the earlier stage. The initial lack of absolute certainty implicit in the statutory scheme is more than compensated for by the near certainty that the mandatory direction will in fact continue to operate at trial.

70. Nor am I in the least persuaded that this statutory scheme is in any way inconsistent with the requirements of article 6. The hearing does not cease to be "public" merely because a witness's evidence may be given by live link and/or in part by video recording. Nor is it necessary to justify such measures in each individual case. Parliament was perfectly entitled to conclude that the interests of justice generally would be better served by introducing an almost invariable rule such as will not merely in the vast majority of cases maximise the quality of child witnesses' evidence but will also encourage their full cooperation with the criminal justice system, than by retaining the maximum opportunity for face to face confrontation with child witnesses at trial.

71. For these reasons and those more particularly given by my noble and learned friends Lord Rodger of Earlsferry and Baroness Hale of Richmond with which I fully agree I too would answer "yes" to the certified question and would dismiss these appeals.