EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Anonymous witness evidence did not affect the fairness of trial in gang shooting case

In its decision in the case of **Ellis and Simms and Martin v. the United Kingdom** (application nos. 46099/06 and 46699/06) the European Court of Human Rights has unanimously declared the application **inadmissible**. The decision is final.

The case concerned the applicants' complaints that they had been convicted in an unfair trial as a result of the decision to allow an anonymous witness' evidence against them.

Principal facts

The applicants, Marcus Ellis, Rodrigo Simms and Nathan Antonio Martin, are British nationals who were born in 1980, 1984 and 1978 respectively and are currently detained in prison.

In January 2003 two young women were killed, and two others were injured in a shooting outside a party at a Birmingham hairdressing saloon. It was undisputed that the shooting was gang-related, and the prosecution case was that it had been carried out by members of the Burger Bar gang in a revenge attack on members of the rival Johnson Crew gang. The victims of the shooting were not members of either gang and were caught in the cross-fire.

The applicants were charged with murder and attempted murder. The prosecution relied on evidence as to the purchase of the car used in the shootings as well as telephone calls made by the applicants, including cell site evidence providing information on the locations from which the calls were made.

Witnesses to the shooting were generally unwilling to come forward fearing retaliation. Only five witnesses were prepared to make statements but did not want their identities to be disclosed. One of the witnesses, who was given the name "Mark Brown" for the purposes of the trial, claimed to have seen Mr Ellis and Mr Martin in the car from which the shots were fired. Background information about the witnesses was disclosed by the prosecution. It was disclosed that Mark Brown had links to the junior arm of the Johnson Crew and that he had a grudge against three of the people in the car. Details of his criminal background and prison terms served were also disclosed.

The trial judge allowed Mark Brown to give anonymous evidence at trial. He noted that it was not disputed that Mark Brown reasonably feared retribution both personally and for his families if his identity were made known. He considered the possible support for Mark Brown's evidence and the relevant case-law of the European Court of Human Rights on the right to a fair trial. He examined closely the different interests involved, namely of society and victims to have criminals tried and punished, of witnesses to be protected, and of the accused to be able to properly defend themselves. He noted that there had been extensive disclosure in Mark Brown's case which would permit detailed cross-examination by the applicants' lawyers. He kept his ruling under review and revisited it a number of times following further disclosure and on the invitation of the defence.

Prior to Mark Brown taking the witness stand, the judge directed the jury that the fact that Mark Brown was giving evidence anonymously restricted the defence in the conduct of their cases. At the conclusion of the prosecution case, the trial judge rejected a defence submission that there was no case to answer in respect of the applicants. He

noted that Mark Brown had been cross-examined most effectively for several days and concluded that there was sufficient other evidence pointing to the applicants' participation in the shootings to allow the jury to consider Mark Brown's evidence. In his later summing up and directions to the jury, the trial judge highlighted the weak aspects of Mark Brown's evidence and told the jury to ignore his evidence if they doubted his reliability or were not satisfied that there was other evidence, apart from his statement, of the applicants' involvement in the shooting.

In March 2005, the applicants were found guilty and sentenced to life imprisonment. Their appeals were dismissed by the Court of Appeal which commended the conduct of the case and the rulings by the trial judge.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 14 November 2006.

Relying on Article 6 §§ 1 and 3 (d), the applicants complained that the decision to grant Mark Brown anonymity and the admission of his oral evidence at trial had breached their right to a fair trial, including the right to examine a witness against them.

The decision was given by a Chamber of seven, composed as follows:

Lech **Garlicki** (Poland), *President*,
David Thór **Björgvinsson** (Iceland),
Nicolas **Bratza** (the United Kingdom),
Päivi **Hirvelä** (Finland),
George **Nicolaou** (Cyprus),
Zdravka **Kalaydjieva** (Bulgaria),
Vincent A. **de Gaetano** (Malta)*, Judges*,

and also Lawrence **Early**, *Section Registrar.*

Decision of the Court

Article 6 §§ 1 and 3 (d) (fair trial)

The Court noted that it had recently examined the requirements of Article 6 § 3 (d) in the context of absent witnesses (as opposed to anonymous witnesses) in the case of *Al-Khawaja and Tahery v. the United Kingdom* (Grand Chamber), nos. 26766/05 and 22228/06, 15 December 2011. There, it had explained that Article 6 § 3(d) enshrined the principle that before an accused could be convicted, all evidence against him had normally to be produced in his presence at a public hearing so that it could be challenged. Exceptions to that principle were possible but could not infringe the rights of the defence.

The Court observed that the problems posed by absent witnesses, at issue in *Al-Khawaja and Tahery*, and anonymous witnesses, as in the present case, were not different in principle. The underlying principle was that defendants should have an effective opportunity to challenge the evidence against them. However, it considered that the precise limitations on the defence's ability to challenge a witness in proceedings differed in the two cases and that different considerations therefore arose. Unlike absent witnesses, anonymous witnesses were confronted in person by defence counsel, who was able to press them on any inconsistencies in their account. The judge, the jury and counsel were able to observe the witnesses' demeanour under questioning and form a

view as to their truthfulness and reliability. The extent of the disclosure regarding anonymous witnesses also had an impact on the extent of the limitations on the defence.

The Court concluded, applying the approach in *Al-Khawaja and Tahery*, that in cases concerning anonymous witnesses, Article 6 § 3 (d) imposed three requirements: first, there had to be a good reason to keep secret the identity of the witness; second, the Court had to consider whether the evidence of the anonymous witness was the sole or decisive basis of the conviction; and third, where a conviction was based solely or decisively on the evidence of anonymous witnesses, the Court had to satisfy itself that there were sufficient counterbalancing factors, including strong procedural safeguards, to permit a fair and proper assessment of the reliability of that evidence to take place.

In this case, the Court emphasised that there was a clear public interest in ensuring that gang-related crime was prosecuted, and that allowing witnesses to give evidence anonymously was an important tool in enabling such prosecutions. It had not been disputed that Mark Brown feared retribution had his identity been disclosed and the Court therefore accepted that there had been good reasons to permit him to give evidence anonymously.

As to the sole and decisive nature of the evidence, the Court referred to the other prosecution evidence in the case. It was satisfied that Mark Brown's evidence was not the "sole evidence" but accepted, like the trial judge, that there was a possibility that his evidence might have been decisive in respect of at least some of the applicants.

It was therefore necessary to examine the counterbalancing factors in place to permit a fair and proper assessment of the reliability of Mark Brown's evidence. The Court referred to a number of aspects of the trial. First, the applicants' lawyers, the judge and the jury had all been able to make their own assessment of the reliability of Mark Brown's statements, given that they all could see and hear him give evidence and could therefore observe his behaviour during the trial. Second, the trial judge had ruled on the question of the admission of Mark Brown's anonymous evidence several times, each time conducting a detailed examination of the relevant issues and bearing in mind the need to ensure a fair trial. Third, the judge had emphasised the need for independent evidence implicating the applicants in the shootings. Fourth, the jury had been warned by the judge to approach Mark Brown's evidence with caution and the judge had given them specific instructions about the limitations on the defence and the need for supporting evidence. Fifth, there had been substantial disclosure about Mark Brown which had provided extensive material for cross-examination. Finally, effective cross-examination of Mark Brown had in fact taken place. The Court concluded that the applicants had been able to challenge effectively the reliability of Mark Brown's evidence.

The Court was accordingly satisfied that the jury had been able to conduct a fair and proper assessment of the reliability of Mark Brown's evidence in the applicants' trial. It therefore dismissed the applicants' complaints and declared the case inadmissible.

The decision is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.