

## **ATTORNEY GENERAL'S GUIDELINES**

### **THE PROSECUTOR'S ROLE IN APPLICATIONS FOR WITNESS ANONYMITY ORDERS CRIMINAL EVIDENCE (WITNESS ANONYMITY) ACT 2008**

#### **A FOREWORD**

- A 1. Every defendant has a right to a fair trial. An important aspect of a fair trial is the right of the defendant to be confronted by, and to challenge, those who accuse him or her.
- A 2. Making an application for a witness anonymity order is therefore a serious step, to be taken by the prosecutor only where there are genuine grounds to believe that the court would not otherwise hear evidence that should be available to it in the interests of justice; that other measures falling short of anonymity would not be sufficient; and that the defendant will have a fair trial if the order is made.
- A 3. Anonymous witness testimony is not necessarily incompatible with Article 6, even when it is the sole or decisive evidence against the accused. But whether the measures used to allow a witness to give evidence anonymously in any particular case would make the trial unfair has to be evaluated with care on the facts of each case.
- A 4. When assessing whether and in what terms to make an application for a witness anonymity order, prosecutors have overriding duties to be fair, independent and objective. These guidelines set out the overarching principles by which a prosecutor should consider, and if appropriate apply for, a witness anonymity order in accordance with the considerations set out in the Criminal Evidence (Witness Anonymity) Act 2008.

#### **B THE PROSECUTOR'S DUTIES**

- B 1. The effect of a witness anonymity order is to prevent the defendant from knowing the identity of a witness. Without this information the defendant's ability to investigate and challenge the accuracy or credibility of the witness's evidence may be limited.
- B 2. When considering whether to make a witness anonymity order the court will consider to what extent the defendant needs to know the identity of the witness in order to challenge the witness's evidence effectively. This question will often be central to the question of whether, having regard to all the circumstances, the witness anonymity order sought would be consistent with a fair trial.
- B 3. The prosecutor's role is:

- To act with scrupulous fairness.
- To examine with care, and probe where appropriate, the material provided in support of the application and the evidential basis for it. Prosecutors should in particular objectively assess any statement made by the witness or witnesses in question and the grounds on which it is based.
- To be satisfied before making the application that, viewed objectively, it can properly be said that the order is necessary and in the interests of justice and that the defendant can receive a fair trial.
- To put before the court all material that is relevant to the application. Courts will rely to a significant extent upon the prosecutor and the investigator to provide relevant material. Material will be relevant if the prosecutor relies upon it to support the application, or if it may tend to undermine or qualify the justification for making the order at all, or for making it in the form sought by the prosecutor. Material is particularly relevant if credibility is or may be in issue, for example if there is a known link between the witness and the defendant or a co-accused.
- To disclose as much relevant material to the defence as possible without identifying the witness, including material that may tend to cast doubt on the credibility, reliability or accuracy of the witness's evidence.

B 4. The role of the prosecutor as an independent and impartial minister of justice is of paramount importance. Applications should only be authorised by prosecutors at an appropriately senior level within the prosecuting authority.

B5. The interests of justice include the interests of the victim or victims, the interests of the witness or witnesses, the interests of the defendant and any co-defendants and the wider public interest.

B6. Prosecutors should take all necessary and reasonable steps consistent with a fair trial and the interests of justice to ensure the safety of a witness or the avoidance of real harm to the public interest or the protection of property.

## **C APPLICATIONS BY DEFENDANTS**

C1 The Act permits a defendant (as well as a prosecutor) to apply for a Witness Anonymity Order. Prosecutors should respond to such applications independently and objectively. Prosecutors should examine critically, but fairly, the basis for any application and any material put forward in support of any application.

- C2 The prosecutor should provide the court with all material within the prosecutor's possession or control that is relevant to the defendant's application.

#### **D APPOINTMENT AND ROLE OF SPECIAL COUNSEL IN APPLICATIONS FOR WITNESS ANONYMITY**

- D1 The Act makes no statutory provision for the appointment of Special Counsel.

- D2 A criminal court may invite the Attorney General to appoint Special Counsel.<sup>1</sup> However, in line with authority, such an appointment:

- Should be regarded as '... exceptional, never automatic, a course of last and never first resort.' R –v- H and R –v- C [2004] UKHL 3. The need for Special Counsel has to be shown.
- The court will take account of the seriousness of the issue that the court has to determine in the particular case. Whether credibility is at issue is likely to be an important consideration. The court will also need to consider the extent to which Special Counsel could further the defendant's case.
- The court itself can be expected to perform a role of testing and probing the case which is presented on the application. When coupled with the prosecutor's duty to put all relevant material before the court, this may often be sufficient to enable a fair and informed decision to be reached without the need to appoint Special Counsel.

- D3 Where appointed, the role of Special Counsel is to make representations on behalf of the accused in any closed proceedings.

- D4 The Attorney General will consider each invitation to appoint Special Counsel on its merits, having regard to the all the relevant circumstances of the case. In particular, in this context, to the basis of the application, whether it is opposed, the basis upon which it is opposed and the particular considerations that the court wishes Special Counsel to address.

- D5 A prosecutor making an application for a witness anonymity order should always be prepared to assist the court to consider whether the circumstances are such that exceptionally the appointment of Special Counsel may be called for. When appropriate a prosecutor should draw to the attention of the court any aspect of an application for a

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<sup>1</sup> Most recently, *Shiv Malik and Manchester Crown Court and Chief Constable of Greater Manchester Police, Constable and Robinson Ltd and Attorney General as interested parties* [2008] EWHC 1362 (Admin).

witness anonymity order or any aspect of the case that may, viewed objectively, call for the appointment of Special Counsel.

- D6 When a court decides to invite the Attorney General to appoint Special Counsel the prosecutor should (regardless of any steps taken by the court or any defendant) ensure that the Attorney General's Office is promptly notified; and assist in ensuring that the Attorney General receives all the information needed to take a decision.
- D7 Where Special Counsel is appointed, he or she will initially be provided by the prosecutor with any open material made available to the accused regarding the application (and any other open material requested by Special Counsel). Special Counsel may then seek instructions from the defendant and his legal representatives. Only then will Special Counsel be provided by the prosecutor with the closed or un-redacted material provided to the court.

**Her Majesty's Attorney General  
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