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Case comment: R (Wang Yam) v Central Criminal Court

Subject: Criminal procedure

Keywords: *In camera* trials; Secrecy; Right to a fair trial; Hindrance; Effective conduct of investigation.

Legislation:

European Convention on Human Rights art. 34

European Convention on Human Rights art. 38

Cases:

R (*Wang Yam*) v *Central Criminal Court* [2015] UKSC 76.

Janowiec v Russia (2013) 58 EHRR 792

Al Nashiri v Poland (2014) 60 EHRR 393.

Abstract:

In R (Wang Yam) v Central Criminal Court the Supreme Court has held that the domestic courts enjoy an inherent jurisdiction to make orders which have the effect of preventing an applicant to the Court of Human Rights from putting material before that court. This analysis considers the decision in the context of the growth of 'secret trials' in the domestic criminal system, arguing that the Supreme Court's decision may merely postpone a dispute between the UK and the Strasbourg Court on the implications of this growth in secrecy for the UK's compliance with the Convention.

Introduction

The decision of the Supreme Court in *R (Wang Yam) v Central Criminal Court*¹ speaks to two important themes of the modern constitutional era: the expansion in the forms of secrecy which are available in the domestic courts (and their knock-on effects) and the relationship between the domestic legal system and the ECHR regime. Though it confirms that the English courts' inherent jurisdiction is capable of being exercised in a manner which effectively prevents an applicant to the Court of Human Rights from putting material before that Court, it does not mark the end of the applicant's legal travails, nor does it preclude the possibility that the spread of secrecy through the domestic legal system will (again) bring the United Kingdom into conflict with the Convention system.

Background

It is by now clear that the English courts enjoy the power to order a criminal trial to take place, wholly or in part, *in camera*, with press and public excluded, where necessary in order to protect the public interest against harm that would be caused by the disclosure, as part of the trial

¹ *R (Wang Yam) v Central Criminal Court* [2015] UKSC 76.

process, of sensitive information.² While analogous powers exist in statute,³ the courts have not tended to rely upon any enactment in making an *in camera* order. Instead, they have asserted that they do so under their inherent jurisdiction as courts of law to make such orders as are necessary in order to do justice in the case before them.⁴ Though the fact that they enjoy such a power seems now uncontroversial (and was not contested here),⁵ the courts have a distance to go in terms of articulating and exploring the circumstances in which such an order will be justified, and the limits placed upon it by (common law) constitutional principle. In the context of first-order disputes regarding whether and when an *in camera* order can be made, however, the Convention Rights have played little role – the Convention clearly endorses the possibility of excluding the press and public from criminal trials where “strictly necessary” in the interests of, amongst other things, national security⁶ – with the key questions instead whether the interests of justice require the making of the order (because, without such a thing, there is a real risk that the prosecution will be discontinued) and whether the making of the order would be unfair to the defendant (in which case the order cannot be made no matter the consequences).⁷

More pressingly, the effect of an *in camera* order cannot logically cease with the conclusion of the trial in respect of which it is made: to protect the public interest against the harm that would be caused by the disclosure of the material whose sensitivity saw that order made in the first place, the order in question (or associated orders) must, it seems, prohibit the disclosure of that material indefinitely. These consequential orders – also made under the courts’ inherent jurisdiction⁸ – can have a striking effect. They can prevent courts which have considered the matter from publishing their judgments in full, requiring them instead to redact the version which is made available to the public,⁹ and can require that redaction to carry over into subsequent civil claims.¹⁰ But they cannot, of course, prevent other courts from considering the *in camera* material – at least not the domestic courts: if material could be considered at trial but not on appeal, justice would not be seen to be done and would likely not in fact be done.¹¹ The present case, arising out of the conviction of Wang Yam for the murder, in 2006, of the retired

² See *R v The Crown Court at the Central Criminal Court Ex p. A* [2006] EWCA Crim 4; *R v Wang Yam* [2008] EWCA Crim 269; *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861.

³ See, e.g., Official Secrets Act 1913 s.8(4).

⁴ See *R v Wang Yam* [2008] EWCA Crim 269, [5]-[6].

⁵ The point was not contested by counsel for Wang Yam, though given that has never been decided by the Supreme Court, there must remain the possibility of it being contested in that forum on some future occasion.

⁶ See, e.g., *Welke and Biatek v Poland* (15924/05), 1 March 2011.

⁷ The most detailed consideration of the issues is found in *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861.

⁸ E.g., *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [55]: “the court must have an inherent power to issue ancillary order or direction whose express object is to secure the purpose of the order made in court.” The courts in the course of the litigation have also relied upon powers under s. 12 of the Administration of Justice Act 1960 and s.11 of the Contempt of Court Act 1981: see *Wang Yam v Attorney General* (27 February 2014), [75]-[79].

⁹ See, e.g., *R v Khyam* [2008] EWCA Crim 1612.

¹⁰ See, e.g., *Amin v Director General of the Security Service* [2013] EWHC 1579 (QB)

¹¹ See, e.g., *Bank Mellat v HM Treasury (No.1)* in which the Supreme Court (albeit considering closed rather than *in camera* material) started from the proposition that “the Supreme Court can conduct a closed material procedure where it is satisfied that it may be necessary to do so in order to dispose of an appeal” ([43]) and held that none of the countervailing factors identified were sufficient to outweigh that power.

writer Allan Chapelow, raised the distinct question of whether the inherent jurisdiction can be used to make orders consequent to an *in camera* order which have the effect of preventing an individual from putting the *in camera* material before the European Court of Human Rights in Strasbourg pursuant to an application to that Court.¹² Though the rules of the Strasbourg Court permit the non-disclosure of material put before it where that material's disclosure would be harmful on, *inter alia*, national security grounds,¹³ and the Court may hold private hearings in order to consider it,¹⁴ the Supreme Court has decided the such orders are not inherently incompatible with either the ECHR nor English law.

Procedural history

The procedural history of the case must be outlined briefly. In 2007, Ouseley J at the Central Criminal Court made an *in camera* order in respect of Wang Yam's trial. The order was affirmed by the Court of Appeal, which considered the *in camera* material and delivered a closed judgment.¹⁵ Having been convicted of murder (after a retrial) and appealed (unsuccessfully) against that conviction (based partly on the claim that the *in camera* order rendered the conviction unsafe),¹⁶ Wang Yam made an application to the Strasbourg court, challenging the compatibility of his conviction with Article 6 ECHR.¹⁷ Having done so, he sought to confirm that the original order did not prevent reference being made to that material in his response to the UK's observations; should it, as originally framed, prevent such reference, he sought to have the terms of the order varied to allow it. Ouseley J in fact responded by varying the terms of the order to make explicit what had been uncertain – that to make reference to the relevant material before the Strasbourg Court was prohibited.¹⁸ The varied order was challenged by way of judicial review (before a Divisional Court which had not seen the *in camera* material), with permission to bring the judicial review granted but the substantive claim dismissed.¹⁹ Though permission to appeal was refused, a question was certified for a leapfrog appeal to the Supreme Court, in which the case was heard by a panel of seven judges.

The Supreme Court's decision

The Supreme Court (whose judgment was given by Lord Mance, with whom the six other judges agreed) unanimously dismissed the appeal in a judgement which belies any impression given by the size of the panel that a constitutionally controversial decision was imminent. Because the challenge was to the underlying legal power rather than to its exercise in this case,²⁰ the appellant was required to argue that an order can *never* be made which has the effect of preventing an applicant putting material before the Strasbourg Court; that, first, an order which has that effect is necessarily contrary to the Convention and therefore, second, domestic courts have, under

¹² Application 31295/11, lodged 28 April 2011.

¹³ Article 40 (2) ECHR.

¹⁴ For that possibility see Article 40 (1) ECHR: "Hearings shall be in public unless the Court in exceptional circumstances decides otherwise".

¹⁵ *R v Wang Yam* [2008] EWCA Crim 269.

¹⁶ *Wang Yam v R* [2010] EWCA Crim 2072.

¹⁷ *Wang Yam v United Kingdom*, application no. 31295/11.

¹⁸ *Wang Yam v Attorney General* (27 February 2014).

¹⁹ *R (Yam) v Central Criminal Court* [2014] EWHC 3558.

²⁰ *R (Wang Yam) v Central Criminal Court* [2015] UKSC 76, [20].

English law, no power to make such an order. Both arguments were rejected by the Supreme Court.

(a) The position under the ECHR

Two provisions of the ECHR were considered by the Supreme Court to be relevant to the order's compliance with the Convention – Article 34 (on which the appellant had relied) and Article 38 (on which he had not, the interpretation of it which had prevailed at earlier stages of the litigation being unfavourable to his case). By Article 34, parties to the Convention “undertake not to hinder in any way the effective exercise” of the right to make an application to the Court of Human Rights and it was argued here that an order preventing Wang Yam from putting the *in camera* material before the Strasbourg court was a hindrance to the pursuit of his application even though that original application had itself been made without difficulty – the case is therefore distinguishable from the classic ‘hindrance’ cases in which national authorities use more or less overt methods to dissuade the victim of a breach of the Convention rights from applying to the Court or to persuade the victim to withdraw an application once made. Neither before Ouseley J (hearing the application to vary the order so as to permit reference to be made to the *in camera* order) nor at first instance in the application for permission to bring a judicial review against Ouseley J's revised order, was Article 34 point considered directly. In the Supreme Court, it was dealt with briefly and, largely via a reassertion of earlier findings that it was both necessary and fair to hold the material *in camera* and that attempts to argue that publication of that material would have assisted the applicant's defence had repeatedly rejected (at trial and on appeal). The relevance of these facts to the Article 34 point must be doubted, and the analysis of the point as a whole leaves much to be desired. Though the Supreme Court's conclusion on this point must be correct, in light of the spread of *in camera* orders (on one occasion paired with anonymization of the defendants),²¹ a fuller consideration of how far the courts might go in limiting communication with the Court of Human Rights would have been most welcome.

More significant to the disposal of the case was Article 38 – often treated by the Court as the corollary of Article 34²² – which states that the Court will examine the case and “if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.” The procedure put in place by Article 38 therefore clearly envisages that it will be the Strasbourg Court which decides which if any material it requires in order to determine the complaint and so whether, for example, to decide an Article 6 claim founded upon part of a trial having taken place *in camera* requires an examination of material not publicly aired. The Strasbourg jurisprudence canvassed by the Supreme Court differs from the present case – in which the material was known to the applicant and has been deployed by him before the domestic courts – in that it relates to situations where the material was kept from the applicant. That jurisprudence shows that the Court of Human Rights will – because it is not well-placed to assess claims about what national security requires in terms of disclosure and non-disclosure – concern itself in the first place with the process by which decisions as to disclosure are arrived at rather than itself (re-)determining where the

²¹ *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861 (the anonymization was overturned by the Court of Appeal).

²² See, e.g., *Janowiec v Russia* (2013) 58 EHRR 792, [209].

balance of the public interest in disclosure and non-disclosure lies, and even then only where the process is being cited by the High Contracting Party to justify its failure to provide the Court with the material it seeks. Where, for example, the Court had found Russia to have breached Article 38 in relation to a complaint arising out of the Katyn massacre in Poland in 1940 (by failing to provide the Court with a copy of the decision discontinuing criminal proceedings) the nature of the breach was primarily a procedural one, relating to the quality of the domestic legal process whose conclusion was cited as justification for the non-disclosure. In particular, the domestic courts had failed properly to scrutinise the claim that national security considerations prevented that document's disclosure.²³ The Strasbourg court was not required to take a view on the substance of the national security claim.

The second case on which the Supreme Court relied – *Al Nashiri v Poland*²⁴ – was treated unconvincingly. There, Poland was held to have breached Article 38 by reason of its failure to disclose the findings of inquiries into a CIA detention facility operated in Poland. The Supreme Court is strangely ambiguous as to the basis of that finding, which the judgment of the Strasbourg Court shows to have at least two strands. First, the absence of procedural safeguards guaranteeing the confidentiality of the material if handed over to Strasbourg was, the Court of Human Rights made clear, insufficient justification to avoid a breach of Article 38,²⁵ given that (as noted above) the Strasbourg Court has the ability to restrict public access to documentation placed before it in the interests of national security, and to hold *in camera* hearings if necessary. Second, Polish domestic legal impediments could not justify a failure to act in accordance with Article 38.²⁶ This fuller account of the decision in *Al-Nashiri*, together with the decision in *Janowiec*, gives some sense of how events might now unfold. First, as the Supreme Court notes, it is true that it is by no means inevitable that the Strasbourg Court will ask disclosure to be made to it of the material subject to the *in camera* regime. As such, its conclusion on this first point – that an order which prevents an applicant putting material before the Court of Human Rights is not *per se* incompatible with the Convention – must again be correct. Nevertheless, the decision as to what material to request belongs to the Court of Human Rights alone,²⁷ and so the possibility remains that it will take the view that, given that its own rules provide for sufficient secrecy as to overcome any concern regarding the consequences of disclosing the *in camera* material, the Article 6 complaint cannot be determined without sight of that material. If (as it surely would) the United Kingdom refuses, it will not suffice by way of justification to cite the (varied) *in camera* order. Instead, the United Kingdom will point to the multiple Ministerial certificates produced by the executive, the repeated acceptance by courts which have themselves seen the *in camera* material that the balance of the public interest lies where the executive asserts that it does, and – most crucially – the fact that Wang Yam has been able to judicially review the most recent decision sustaining the *in camera* order. It will on that basis argue that the domestic legal process is sufficiently robust as to have allowed an effective challenge to the assertion that national security requires that the material be withheld. Counting against the government to some extent might be the poorly-understood law of *in camera* trials, which has never been the

²³ Ibid, [214].

²⁴ *Al Nashiri v Poland* (2014) 60 EHRR 393.

²⁵ Ibid, [365].

²⁶ Ibid, [366].

²⁷ Ibid, [355].

subject of direct consideration by the Supreme Court and which has been dealt with rather cursorily by the Court of Appeal when it has had occasion to consider the question. As things stand, however, the government will be able to highlight the failure of Wang Yam to challenge the specific exercise of the inherent jurisdiction which saw the non-disclosure regime put in place continued by Ouseley J, in favour of challenging instead the legal principles which permitted that exercise. Fairly or not, the decision not to challenge the appropriateness of the continuation in the present case was the subject of pointed comment by Lord Mance,²⁸ who implied that such a challenge might yet be brought.²⁹ In such an event, the Supreme Court may need to hold an *in camera* hearing in order to review the material subject to the *in camera* regime. And, ultimately, even if the Court of Human Rights accepts that the *in camera* material need not be produced, its case law suggests that it may well seek a redacted or summary version of the material. The failure to produce the material (or a summary thereof) without a justification acceptable to the Strasbourg Court would represent a breach of Article 38.

(b) The domestic legal position

Its conclusion as to the relevant international legal position renders strictly obiter the Supreme Court's consideration of whether that question of international law is relevant to the domestic legality of the order made by Ouseley J. The point is that, as is well-known, the mechanism by which the Convention was transposed into domestic law distinguishes the substantive rights from other, mostly procedural, provisions.³⁰ In particular, the two Articles crucial to the question of international legality – 34 and 38 – were not incorporated into domestic law. The question therefore segues into that of the (domestic) legal status of unincorporated provisions of international treaties, of which the Convention is of course only the most prominent example. Here, the answer offered is resolutely orthodox: the dualism of the United Kingdom constitutional order, whereby international legal provisions are available in domestic law only where Parliament has legislated to make them so, is bluntly reaffirmed.³¹ Unsurprisingly, given that we are in the realm of procedure rather than substance, no mention is made of the nascent heterodox approach to this issue visible in, for example, the judgment of Lord Kerr in the 'benefits cap' case,³² whereby (on the basis that the rule against enforcement of unincorporated treaties is aimed at preventing the interests of the citizen from being harmed without Parliament's agreement) treaties which protect the individuals' rights (and to which the logic of the general rule does not therefore apply) are given effect even where unincorporated.³³ Such an exception would of course be doubly controversial in the context of a treaty such as the ECHR, some of whose provisions have been transposed into domestic law, and the provisions which were not can therefore reasonably be assumed to have been very deliberately excluded by Parliament (and excluded for, in the case of procedural provisions, good reason). Even the more limited (but still heterodox) claim that a domestic decision maker might be required to consider a country's obligations under international law when exercising a discretion finds no purchase. First, that claim – where it has been made – applies only to 'fundamental' rights, and to the

²⁸ [2015] UKSC 76, [20] and [34].

²⁹ *Ibid*, [34].

³⁰ Human Rights Act 1998, s.1.

³¹ [2015] UKSC 76, [35].

³² *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16.

³³ *Ibid*, [255]-[256].

extent that Article 34 in fact (as a corollary of Article 38, perhaps) creates any obligation on the United Kingdom, Lord Mance is of the view that the obligation is not ‘fundamental’.³⁴ Second, even it were, there is no mechanism by which the obligation and associated right might be brought to bear on the judge’s exercise of his discretion in making the order – the principle of legality applies only to rights available in domestic law. Third, had there been any obligation to take account of the relevant provisions of unincorporated treaties, it is clear that Ouseley J would – notwithstanding his eventual conclusion – have done enough to fulfil it.³⁵ Finally, because the basis of the *in camera* order was the inherent jurisdiction rather than a statute, the interpretive principle whereby it is assumed that Parliament intended to legislate compatibly with the UK’s international obligations is of no significance.³⁶ In sum, even if the order had been held – contrary to the conclusion of the Supreme Court here – to be incompatible with the Convention, that conclusion would not have undermined its domestic legality. On this point also, it seems impossible that the Supreme Court could have decided otherwise.

Conclusion

Against a background in which the power to hold a criminal trial *in camera* has quickly become uncontroversial (perhaps distressingly so), and the dualist status of the United Kingdom’s constitution has been repeatedly reaffirmed in recent times, the Supreme Court’s decision in *Wang Yam* must count as unsurprising. That is not to say, however, that more difficult questions will not arise in future. The most obvious source of future conflict would be a request by the Court of Human Rights to the UK Government to supply it with material which contains those facts kept from public view during Wang Yam’s trial. Given the efforts made so far by the executive to keep that material out of the public domain (and the repeated assertion that national security would be harmed by its disclosure) it must be anticipated that any such request will be refused, potentially placing the UK in breach of its obligations under the Convention. Such a scenario would introduce a new and interesting dynamic into contemporary disputes about the international rule of law³⁷ – the government citing its domestic legal obligations to justify resisting those of international law. All the while, the substance of the claim – that the *in camera* trial constituted a violation of Wang Yam’s Article 6 rights – remains to be determined, and might well be determined without the Court of Human Rights having sight of the material in question. Not only is the Court permitted to draw “such inferences as it deems appropriate” from any hypothetical failure by the UK to supply the *in camera* material,³⁸ but the point has also been made by Ouseley J that the “insignificance” of that material might not be appreciated by those who have not seen it.³⁹ Any such failure – whether or not in the face of a request by the Strasbourg Court – therefore makes it more rather than less likely that a breach of the Article 6 claim will be found. More speculatively, the case law on open justice in English law has been able to retain its focus on the relevant common law principles in large part because there are many questions on which the effect of these principles is (or is assumed to be) identical to that of the application of the relevant provisions of the ECHR. Should those two sets of norms diverge,

³⁴ [2015] UKSC 76, [36].

³⁵ *Wang Yam v Attorney General* (27 February 2014), [51].

³⁶ [2015] UKSC 76, [35].

³⁷ In particular surrounding the re-writing of the Ministerial code in late 2015.

³⁸ Rule 44C (1) of the ECHR.

³⁹ *Wang Yam v Attorney General* (27 February 2014), [61].

however, and the Convention come to require a higher standard of procedural protection than is offered by the common law, a more direct clash between the United Kingdom and the Council of Europe – of the sort now familiar from the context of prisoners' right to vote – might follow.