Michaelmas Term

[2015] UKSC 76

On appeal from: [2014] EWHC 3558 (Admin)

JUDGMENT

R (on the application of Wang Yam) (Appellant) v Central Criminal Court and another (Respondents)

before

Lord Neuberger, President

Lady Hale, Deputy President

Lord Mance

Lord Clarke

Lord Sumption

Lord Reed

Lord Toulson

JUDGMENT GIVEN ON

16 December 2015

Heard on 2 November 2015

Appellant	Respondents
Lord Pannick QC	James Eadie QC
Kirsty Brimelow QC	Jonathan Hall QC
Nikolaus Grubeck	
(Instructed by Janes Solicitors)	(Instructed by The Government Legal Department)

LORD MANCE: (with whom Lord Neuberger, Lady Hale, Lord Clarke, Lord Sumption, Lord Reed and Lord Toulson agree)

Introduction

1.
The issue before the Supreme Court lies within a very narrow compass. The appellant is applying to the European Court of Human Rights to challenge the fairness of his trial because it was held partially in camera. The United Kingdom has in its observations to the court resisted this application. The

appellant wishes to be permitted in his response to disclose and refer to contents of the evidence given in camera. The limited issue now before the Supreme Court is whether the English courts have any discretionary power in any circumstances to refuse to permit the appellant to do this at this stage of the proceedings before the European Court of Human Rights. If the English courts have any discretion at all in this regard, the question whether circumstances exist justifying its exercise in this case is not before the Supreme Court.

2.
In a purely domestic context, it is now common ground that the English courts have a discretionary power to refuse to permit disclosure of material deployed in camera. The issue on this appeal is whether this power ceases or ceases to be exercisable, whatever the circumstances, once an applicant to the European Court of Human Rights decides that he wishes to disclose the material to that court in the context (here) of a complaint that the in camera proceedings made his trial unfair. The appellant invokes in this connection obligations which he alleges are imposed on the United Kingdom at the international level under article 34 of the European Convention on Human Rights, an article not incorporated into United Kingdom law by the Human Rights Act 1998.

The appellant's conviction

3.
In circumstances which attracted much public attention at the time, Mr Allen Chappelow, an 86-year old reclusive writer, was on 14 June 2006 found to have been murdered, plainly some weeks beforehand, in his house in Downshire Hill, Hampstead, London. The appellant, who lived two or three streets away, was subsequently charged with his murder and with associated offences of fraudulent misuse of his identity and bank accounts. The appellant denied the murder charge and alleged that he had been given the deceased's cheques, credit cards and banking information by gangsters who he named as "Gaz", Zhao Dong and Ah Ming. He gave descriptions of them and places they frequented or where, in the case of Ah Ming, he said he worked. The appellant alleged that they were responsible for the theft of the deceased's identity and that he was playing along with them as a means of assembling evidence against them and reporting them.

4.
The Crown applied for an order that part of the trial relating to this defence take place in camera in the interests of national security and to protect the identity of a witness or other person. The judge, Ouseley J, considered this exceptional application in the light of the relevant case law of the European Court of Human Rights. By judgment and order dated 15 January 2008 he held that the risks to national security and to witnesses or others, together with the risk that no trial at all might otherwise be possible, justified the making of the order sought and that the defendant would have a fair trial were it to be made. The Court of Appeal (Criminal Division) (Lord Phillips of Worth Matravers CJ, Silber and Underhill JJ) upheld this decision by judgment dated 28 January 2008, after considering the in camera material.

5.
On a first trial, the jury could not agree on the murder charge, but convicted the appellant on charges of fraudulent misuse of the deceased's identity and bank accounts. (That was a conviction which the jury should not have been allowed to deliver while the murder charge and a retrial were outstanding, and it was subsequently set aside by the Court of Appeal.) On a retrial, a second jury on 16 January 2009 convicted the appellant of both murder and burglary, and he was sentenced to life imprisonment with a minimum term of 20 years. During the trial, because of the appellant's difficulty in keeping

distinct the sensitive and non-sensitive aspects of his evidence, the entire defence case was heard in camera in the presence of the appellant and those representing him, who were Mr Robertson QC leading Ms Brimelow instructed by Janes Solicitors. At the end of the retrial, Ouseley J made a further order that nothing be published revealing any evidence or other matter heard or dealt with in camera, other than that which had been said in public during the proceedings.

The appeal against conviction

6.
The appellant appealed against his conviction, on the grounds that, in the light of the hearing of part of the trial in camera, the conviction was unsafe. The fairness of this procedure was again considered by the Court of Appeal (Criminal Division) (Hughes V-P, Saunders and Thirlwall JJ), this time in the light of the way the trial had actually proceeded and again after considering the in camera material. The court dismissed the appeal in a full judgment dated 5 October 2010. Inter alia, it addressed submissions advanced on behalf of the appellant by Mr Robertson QC in a passage which also indicates how substantially the essence of the appellant's case was in fact publicly disclosed:

"21. … He [Mr Robertson] contends that if the evidence which was taken in private, which consisted of four witnesses plus that of the defendant, had been heard in public, there would have been likely to be significantly greater media coverage of the trial, and that there is a real possibility that additional witnesses supporting the defendant in his case would have come forward on seeing it. In particular, he suggests that there is a real possibility that witnesses would have come forward to confirm the existence and gangster characteristics of those whom the defendant blamed for the supply to him of the deceased's cheques, credit card and banking information. Secondly, he says, there may well have been further evidence of the essentially good and non-violent past character of the defendant.

22. This possibility was considered carefully at the time of the decision to conduct part of the case in camera. We are unable to see that it can be more than the merest speculation. Most of the trial was conducted in public. The defendant was able to name the three persons who he said were responsible for the supply of the cheques and to give a good deal of circumstantial identifying material. The order for the taking of evidence in private had excluded that part of his evidence, expressly so that it could be heard by anyone who chose to be in court, but the defendant when he came to give evidence was unable to confine himself even for a brief period to this kind of material and so it was in the end necessary for all his evidence to be taken in private. Nevertheless, the information about the alleged gangsters was available to be put to several Crown witnesses who gave evidence in open court, including the officer in the case who was cross-examined about them and about what efforts had been made to trace them. Moreover, at the first trial counsel for the defendant had made an opening statement after the Crown opening - in public - and had had the opportunity, taken as we understand it, to identify the persons on whom, on the defendant's case, the defence turned. At the second trial a similar statement could no doubt have been made, but as a matter of trial strategy no request to do so was made. The existence of Aming [Ah Ming] was confirmed by at least one witness and other information about him was elicited. The defendant was also able to advance, in open court, a number of allegations against a prosecution witness, He Jia Jin, and to put before the jury material which suggested, perhaps without much in the way of proof but advantageously so to the defendant, that that man similarly participated in nefarious activities. This all happened twice, in two trials a year or so apart. We are unable to accept that there is a real possibility that other evidence would have emerged given further publicity and that such would have been exculpatory. In reaching that conclusion we have taken into account the enormously strong evidence, summarised below, that the

defendant's account of being involved only in very limited use of the deceased's identity and bank accounts at the behest of others, was simply not true.

23. Insofar as Mr Robertson suggested that further material might also have emerged on which to cross-examine the few witnesses who gave evidence in private this was not made out. The kind of material to which he referred was available at the time and no attempt was made to deploy it.

24. The suggestion that additional good character evidence might also have emerged is similarly unarguable. There was a great deal of evidence of the defendant's character, both praiseworthy and non-violent on the one hand and less good, involving a history of forgery and dishonesty, on the other. The judge summed it up very favourably to the defendant."

The appellant's application to the European Court of Human Rights

7.
By Application No 31295/11 lodged on 28 April 2011 the appellant, again represented by Mr Robertson and Ms Brimelow instructed by Janes Solicitors, has initiated proceedings against the United Kingdom before the European Court of Human Rights, complaining inter alia that his trial and conviction were unfair and violated article 6.1 of the Convention because of the in camera hearing of that part of the trial that went to his defence. The evidential prejudice alleged (in the applicant's application dated 28 April 2011) to have arisen from material being deployed in camera, rather than in public, is the same as that previously alleged and considered by the English trial and appellate courts, namely:

"42. If the trial had been conducted in the normal way - in public - it could have encouraged additional witnesses, who would have supported the defence, to come forward. It would have placed witnesses called by the Crown under public scrutiny.

43. In particular, there is a real possibility- that witnesses who were able to substantiate the applicant's defence that he was being supplied with material stolen from the deceased by 'gangsters', would have made themselves known. Not only could these witnesses have given evidence for the defence, but they also could have provided material with which defence counsel could have cross-examined prosecution witnesses. To that end, the defence was impaired by being unable to properly challenge the case against Mr Yam and present an alternative explanation. A public reporting of this case, undoubtedly, would have raised awareness within the close knit Chinese community in London and the confidence raised by open criminal due process would have encouraged witnesses to come forward."

8.
The United Kingdom in observations dated 9 April 2013 has submitted that the application should be declared manifestly ill-founded and inadmissible or alternatively dismissed on the merits. The issue has thus subsequently arisen, whether the appellant can or should be permitted to refer to the contents of in camera material in his response to the United Kingdom's observations. The European Court of Human Rights on 30 August 2013 extended the time for any response to allow the appellant to apply to the English courts for leave to refer to the contents of in camera material in his response. The court when doing this confirmed that it "has procedures in place to ensure the safe storage of secret documents, should the need arise".

The further application to Ouseley J and the present judicial review proceedings in respect of his ruling

9.
The appellant duly made an application to Ouseley J. The Attorney General intervened as an interested party. A certificate dated 11 December 2013 was made by the Rt Hon William Hague MP, Secretary of State for Foreign and Commonwealth Affairs, stating that he had considered “in camera” material set out in a schedule (not itself disclosed to those acting for the appellant) together with the appellant’s draft of the response which he wishes to put before the European Court of Human Rights, and that:

“10. I have concluded that there would be a real risk of serious harm to an important public interest were either the Order to be discharged in its entirety, or in part, permitting disclosure of the ‘in camera’ information, or were disclosure to be made to the Strasbourg court of the information in the draft ‘response document’.

11. It is not possible for me to be specific in this certificate about the precise harm that disclosure of the information in question would cause, since my doing so would be liable to cause the very damage that the certificate seeks to avoid. Full details are, however, given for the benefit of the court in the Schedule to this certificate.”

10.
On 27 February 2014 Ouseley J ruled that the appellant was not and should not be able to disclose the in camera material in his response and, for the avoidance of doubt, expanded the wording of his order of 15 January 2008 to make this express. The appellant brought proceedings challenging the ruling by way of judicial review. On 31 October 2014, the Divisional Court (Elias LJ and Hickinbottom J) granted permission for judicial review, but dismissed the application on its merits.

11.
Before Ouseley J and the Divisional Court, Ms Brimelow QC representing the appellant referred to the Supreme Court’s decision in Bank Mellat v HM Treasury (No 2) [2013] UKSC 38; [2014] AC 700. The Supreme Court there held by a majority that it must in the interests of justice be able on an appeal to consider closed material deployed before a first instance judge. She submitted that the Supreme Court should adopt similar reasoning as regards in camera material, in the context of the appellant’s current application to the European Court of Human Rights.

12.
Ouseley J was referred to articles 34 and 38 of the Convention and to case law of the European Court of Human Rights dealing with their effect. Articles 34 and 38 bind the United Kingdom at the international level. They are not incorporated into English law by the Human Rights Act 1998. They read:

“34. Individual applications The court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

38. Examination of the case The court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.”

13.
Ms Brimelow submitted that, although articles 34 and 38 are not part of domestic law, domestic courts should, so far as free to, act consistently with the obligations which she submitted that they

involve under international law, and should leave it to the European Court of Human Rights to make such use as it may decide of its own procedural powers to hear the case in camera and to protect the in camera material.

14.
In the light of the parties' submissions and after considering the open certificate as well as its closed schedule, Ouseley J reconsidered whether disclosure as sought by the appellant should be permitted. He concluded that it should not be. On the material before him, he held that "The purpose of the 'in camera' order would be put at risk by disclosure of the 'in camera' material to the Strasbourg Court". He said that, although "a court should not stand in the way of what an applicant wishes to place before Strasbourg, unless there is very good reason to do so", he had "no doubt that there are very good reasons to do so in this case" (para 50). Any obligations arising under articles 34 and 38 of the European Convention on Human Rights operated on the United Kingdom at the international level only (para 51). He was not satisfied that the European Court of Human Rights would insist on disclosure to it by the United Kingdom of the in camera material (para 52). Undertaking, as a domestic court, the balancing exercise referred to by the European Court of Human Rights in Janowiec v Russia (2013) 58 EHRR 792, he had "no doubt but that the balance lies in favour of non-disclosure to the Strasbourg court, even assuming the use by it of its protective procedural powers", bearing "in mind the nature of the evidence as to the interests to be protected, the decisions made thus far on that by the trial and appellate courts, the degree of risk and the possible consequences of disclosure" (para 58).

15.
Ouseley J further amplified his reasons for these conclusions, noting, as had done the Court of Appeal (Criminal Division) (para 6 above), the speculative nature of the appellant's case that a trial in the open would have led to either the named gangsters or any third party coming forward (para 62). He went on:

"63. There is nothing in this point, and nothing to go in the balance favouring disclosure beyond allowing the ECtHR to reach that same, and to my mind inevitable, conclusion itself. That is not nearly enough. I say that, having seen the partial draft of the response which Ms Brimelow wishes to submit to the ECtHR."

16.
The United Kingdom government had also suggested that, with various amendments, the appellant's response could avoid any breach of the prohibition on disclosure. As to this Ouseley J said:

"64. … Those amendments would permit the response document to be submitted and it would then convey something of the flavour of the envisaged submissions. However, if the application on that basis were declared admissible, I doubt that they could all be effectively pursued let alone answered, without the 'in camera' material. But, with the 'amended' response document, the Strasbourg court would be in a better position to judge relevance and what requirement, if any, it should place on the UK Government in relation to the 'in camera' material.

65. At present, therefore, I see no reason to vary the order to enable the material to be deployed before Strasbourg. The Government will have to see how far it can persuade the Strasbourg court not to ask for the material, whether or not in camera, and then decide whether or not to comply with any obligations which Strasbourg may impose. It is not for this court to make that decision for it, let alone at this stage.

66. If the Government wished to disclose material covered by the order, the court would again consider an application for its variation or discharge. The Government is just as much covered by the order as Wang Yam and his lawyers. To the extent that the order covers the use of the 'in camera' material in applications to Strasbourg, whether under its own 'in camera' rules or not, it would be a breach of the order by either party or others to refer to that material without variation of the order or its discharge."

17.
Before the Divisional Court Ms Brimelow advanced essentially the same submissions as had been advanced before Ouseley J. The Divisional Court gave essentially the same reasons for rejecting them. It noted that the right of access to the European Court of Human Rights operates at the international level, and is not analogous to a domestic right of appeal. It said that it was far from clear that the European Court of Human Rights would consider that the order made would infringe Convention principles; and that, in any event, there was no absolute obligation on a domestic court to exercise a domestic discretion in a way which would ensure that the United Kingdom acted compatibly with its international obligations (paras 16 to 22, 28 and 35).

18.
The Divisional Court was asked not to look at and did not look at the in camera material. It was told that there was in this regard "a further matter which [the appellant] may wish to pursue at a later occasion". The Divisional Court addressed this "further matter" as follows:

"59. … He [the appellant] wishes to contend that even if in principle it was open to the judge to make an order interfering with the way in which he wished to present his case, in the particular circumstances of this case the order ought not to have been made. The judge gave disproportionate weight to the national security considerations. The claimant said that he was unable to run this argument because in order to do so his lawyers needed to be able to see the material which had only been disclosed in the closed session, but they were unable to do. The reason is that the Secretary of State has required certain undertakings to be complied with before permitting access to the material. The claimant's lawyers say that these are unjustified conditions and they have refused to comply; hence there has been a stand-off. We were not asked to resolve this matter and in any event we were not in a position to do so. Moreover, we were asked in the circumstances not to look at the confidential material, and have not done so.

60. I confess that it is not clear to me from the grounds that this point had been raised. Counsel has undertaken to give careful consideration as to whether in all the circumstances it is still proper to pursue that ground. If it is pursued, there should be a short hearing before the same court if possible."

19.
The Divisional Court certified the following point of law as being of general public importance, but refused permission to appeal on it to the Supreme Court:

"Is there a power under the common law or under section 12 of the Administration of Justice Act 1960 to prevent an individual from placing material before the European Court of Human Rights? If so, can the power be exercised where the domestic court is satisfied that it is not in the interests of state for the material to be made public even to the Strasbourg court?"

The Supreme Court granted permission to appeal. The parties appearing are the appellant, represented by Lord Pannick QC leading Ms Brimelow QC and Nikolaus Grubeck instructed by Janes Solicitors, and the Attorney General as an interested party.

The parties' cases before the Supreme Court

20.
Before the Supreme Court, Lord Pannick QC accepted, indeed emphasised, that the appellant's case depends on the proposition that the courts below had no relevant power or discretion to exercise at all. This proposition in turn depends upon the submission that the existence or exercise of any such power or discretion would inevitably involve the United Kingdom in a breach of international obligations owed under article 34, at least once an appellant determines to refer to the contents of in camera material in submissions to the European Court of Human Rights. The "further matter" referred to by the Divisional Court (para 18 above) does not and cannot arise on this appeal, since it would involve a challenge to the reasonableness or proportionality of the exercise of any power or discretion which exists. This matter was not argued before the Divisional Court, was linked with the closed schedule which the appellant's advisers have not seen and was left over for further pursuit, if the appellant's advisers thought proper (as they do not appear, at least as yet, to have done), before the Divisional Court.

21.
In relation to the first stated question, both parties have on this appeal proceeded on the basis that any relevant power is to be found in the common law. It is thus unnecessary in this judgment to consider section 12(1)(c) of the Administration of Justice Act 1960, on which the Divisional Court also relied and to which the first certified question set out in para 19 above refers, or section 11 of the Contempt of Court Act 1981, the application of which the Divisional Court considered but did not find it necessary to decide. Lord Pannick accepts that in a purely domestic context the common law power extends to enable the protection of the national interest and/or the interests of witnesses or others by an order regarding in camera material such as Ouseley J made on 15 January 2008. But in his submission no such power can exist or continue to be exercisable in any circumstances where its use would put the United Kingdom in breach of an international obligation. The only basis upon which the power could be exercised inconsistently with such an obligation would be, he submitted, if Parliament expressly authorised this. The international obligation on which he relies before the Supreme Court is article 34, rather than article 38, of the Convention.

Analysis

22.
The appellant can (as I have emphasised) only succeed on this appeal by making good a proposition that there are no circumstances in which refusal to permit disclosure of the in camera material to the European Court of Human Rights in the appellant's response could be justified. For reasons which appear in paras 24 to 34 below, that proposition is not in my opinion made good at the international level by reference to the Convention and case law of the European Court of Human Rights. Moreover, even if it were made good at the international level, it would not, in my opinion and for reasons which appear in paras 35 to 38, follow that the English courts would as a matter of domestic law be obliged to give effect to it.

23.
The right of access to the European Court of Human Rights in Strasbourg is a right conferred by the Convention at the international level. The European Court of Human Rights is an independent

international court, not another tier in the domestic appellate structure. The domestic principles according to which a domestic appellate court may have access to all the materials available to a first instance court have no direct application. Further, any obligations which the United Kingdom may have under articles 34 and 38 operate at the international level, not at a domestic level. However, as stated already, Lord Pannick submits that the United Kingdom is currently under international obligations under article 34, which must under domestic law be seen as controlling the domestic power to restrict disclosure of in camera material. I will address this submission, starting with the question whether it is made good at the international level.

The international legal position under article 34

24.
The submission is that the United Kingdom would, contrary to article 34, be hindering the effective exercise of the appellant's right of application to the European Court of Human Rights, whereby he claims to be the victim of a violation of article 6 of the Convention because of the in camera procedure adopted at his trial. The application itself has been made without hindrance, but Lord Pannick's submission is, clearly, that its effective exercise includes its pursuit and that the English courts can and should conclude that this is being hindered by the appellant's inability at this stage to refer to the in camera material in his response.

25.
The appellant asks the English courts to accept this, in circumstances where English courts have repeatedly examined the question whether it was both necessary and fair to hold part of the trial in camera and have repeatedly concluded that it was. The appellant and those representing him knew of and were able to address the in camera material at trial and on appeal. It arose, as Lord Pannick noted, from the appellant's own defence. The appellant's assertion that publication of its content would in any way have advanced his defence has repeatedly been rejected as implausible. The appellant's current appeal can only succeed if one accepts that the inability to deploy the in camera material in the appellant's response will inevitably constitute a breach by the United Kingdom of an obligation owed by it in international law under article 34. In my opinion, that is not shown to be the case, and in any event, if any court is to reach such a conclusion, it must be the European Court of Human Rights, not the English courts.

26.
Case law of the European Court of Human Rights on article 34 is limited. Sisojeva v Latvia (2007) 45 EHRR 753 to which the Supreme Court was referred concerned the very different subject matter of pressure to dissuade or discourage pursuit of a Convention remedy. The European Court of Human Rights reiterated, uncontroversially, that:

"115. … it is of the utmost importance for the effective operation of the system of individual petition instituted by article 34 of the Convention that applicants or potential applicants are able to communicate freely with the court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.

116. The word 'pressure' must be taken to cover not only direct coercion and flagrant acts of intimidation of applicants or their families or legal representatives but also other improper indirect acts or contacts designed to dissuade or discourage them from pursuing a Convention remedy. Whether or not contacts between the authorities and an applicant or potential applicant amount to unacceptable practices from the standpoint of article 34 must be determined in the light of the particular circumstances in issue."

The actual decision was that there was insufficient evidence that the questioning by security police in the circumstances of that case

“should be regarded as a form of ‘pressure’, ‘intimidation’ or ‘harassment’ which might have induced the applicants to withdraw or modify their application or hindered them in any other way in the exercise of their right of individual petition.” (para 124)

27.
Contrary to the appellant’s case, it is in my opinion relevant to look in the present context not just at article 34, but also at article 38. On the appellant’s case under article 34 he would be the sole judge of what is necessary at this stage for the effective presentation of his case in Strasbourg. This would be so, even though the English courts have, as I have mentioned, repeatedly concluded both that it would be prejudicial to the national interest, to witnesses or to others, if the disclosure were made, and that it was not unfair to him that the disclosure he wishes should not be made. In contrast, the order under appeal leaves it at the international level to the European Court of Human Rights to consider and decide under article 38 whether any and if so what further material should be requested from the United Kingdom to enable it to consider the appellant’s case both at the admissibility stage and, if the matter were to go further, on the merits. Further, the case law of the European Court of Human Rights indicates that that Court will not in this context act as if it were a fourth-instance appeal court re-determining issues of national security, but will review the domestic adjudication on the issues involved and, if satisfied of its fairness and thoroughness, may accept the outcome without insisting on automatic disclosure to itself of secret material.

28.
The most relevant case law consists of Janowiec v Russia (2013) 58 EHRR 792 and Al Nashiri v Poland (2014) 60 EHRR 393. As the reference (above) to “secret material” indicates, these two cases concerned “closed” material held and used by the relevant state which the applicants to Strasbourg had never seen. In contrast, the present appeal concerns material which the appellant and his representatives have been able to see and address in camera both at trial and on appeal. The complaint is simply that its publication to the world at large might have been beneficial to his defence. That is a difference which in my opinion may well weigh with the European Court of Human Rights, as a factor inclining that court to accept the judgment of domestic courts which have adjudicated fairly and thoroughly on the question whether material should, in the interests of national security, witnesses and others, remain in camera at and after trial.

29.
In Janowiec the applicants were relatives of the alleged victims of a massacre of Polish prisoners of war held at Ostashkoy in 1940, for which massacre Russia in 1990 accepted responsibility. They had been refused access to Russian prosecutorial investigation files as well as to a decision on 21 September 2004 to discontinue the criminal case on the ground that the persons responsible were already dead. The European Court of Human Rights in holding that there had been a breach of article 38 said this (italics added):

“208. The court reiterates that article 38 of the Convention requires the Contracting States to furnish all necessary facilities to the court, whether it is conducting a fact-finding investigation or performing its general duties as regards the examination of applications. Being master of its own procedure and of its own rules, the court has complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it. Only the court may decide whether and to what extent the participation of a particular witness would be relevant for its

assessment of the facts and what kind of evidence the parties are required to produce for due examination of the case. The parties are obliged to comply with its evidential requests and instructions, provide timely information on any obstacles in complying with them and provide any reasonable or convincing explanations for failure to comply. It is therefore sufficient that the court regards the evidence contained in the requested decision as necessary for the establishment of the facts in the present case.

209. As regards the allegedly derivative nature of the obligation to furnish all necessary facilities for its investigation, flowing from article 38 of the Convention, the court reiterates that this obligation is a corollary of the undertaking not to hinder the effective exercise of the right of individual application under article 34 of the Convention. Indeed, the effective exercise of this right may be thwarted by a Contracting Party's failure to assist the court in conducting an examination of all circumstances relating to the case, including in particular by not producing evidence which the court considers crucial for its task. Both provisions work together to guarantee the efficient conduct of the judicial proceedings and they relate to matters of procedure rather than to the merits of the applicants' grievances under the substantive provisions of the Convention or its Protocols. Although the structure of the court's judgments traditionally reflects the numbering of the articles of the Convention, it has also been customary for the court to examine the Government's compliance with their procedural obligation under article 38 of the Convention at the outset, especially if negative inferences are to be drawn from the Government's failure to submit the requested evidence. … Furthermore, it is not required that the Government's alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The court reaffirms that the Contracting Party's procedural obligations under articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives."

30.
As to national security considerations, the court said:

"213. The court reiterates that the judgment by the national authorities in any particular case that national security considerations are involved is one which it is not well equipped to challenge. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. If there was no possibility to challenge effectively the executive's assertion that national security was at stake, the state authorities would be able to encroach arbitrarily on rights protected by the Convention."

In Janowiec itself, there had been "no substantive analysis" by the Russian courts of the reasons for maintaining the classified (secret) status, no "meaningful scrutiny" of the executive assertions and no "independent review of whether the conclusion that … declassification constituted a danger to national security had a reasonable basis in fact" (para 214).

31.
In Al Nashiri the two applicants had been detained for six and nine months respectively in a secret CIA detention facility operated in a Polish training base in Poland, where they alleged that they were not only unlawfully detained, but also tortured and ill-treated. The Polish authorities refused access to findings of inquiries by a Polish Parliamentary Committee and Regional Prosecutor. The European Court of Human Rights had twice issued procedural orders for production of the non-confidential part

of the investigative file (para 358), and further found that the Polish Government “had provided no ‘reasonable and solid grounds’ … to justify the treatment of most of the relevant documents in the investigation as secret” (para 354).

32.
The European Court of Human Rights concluded that there had been a breach of article 38, and in para 363 repeated what it had said in para 208 in Janowiec. Dealing specifically with cases where national security or confidentiality are involved, the court in Al Nashiri returned to the theme of para 213 of its judgment in Janowiec in these terms (italics added):

“365. The judgment by the national authorities in any particular case that national security considerations are involved is one which the court is not well equipped to challenge. Nevertheless, in cases where the Government have advanced confidentiality or security considerations as the reason for their failure to produce the material requested, the court has had to satisfy itself that there were reasonable and solid grounds for treating the documents in question as secret or confidential. Where such legitimate concerns exist, the court may consider it necessary to require that the respondent Government edit out the sensitive passages or supply a summary of the relevant factual grounds.

Furthermore, such concerns may, depending on the document, be accommodated in the court’s proceedings by means of appropriate procedural arrangements, including by restricting access to the document in question under rule 33 of the Rules of Court, by classifying all or some of the documents in the case file as confidential vis-à-vis the public and, in extremis, by holding a hearing behind closed doors.”

33.
The reasoning in this case law makes clear the inter-play between articles 34 and 38. The European Court of Human Rights has a central role in deciding what material should be disclosed to it: see especially the passages italicised in the quotations from the judgments in Janowiec and Al Nashiri set out in paras 29 and 32 above. A suggestion of breach of article 34 is a matter for the European Court of Human Rights to consider under article 38. It by no means follows that the court will always order disclosure, even of secret material which the alleged victim has never seen, and still less of in camera material which the alleged victim has seen and addressed. On the contrary, the European Court of Human Rights recognises the sensitivity of national security considerations, and the particular competence - one might add responsibility - of national authorities in handling material affecting national security or the safety of witnesses or others. Thus, in deciding whether to order that material withheld by governmental authorities from an alleged victim should be disclosed to it, the European Court of Human Rights will consider the independence and thoroughness of the domestic procedure for reviewing the authorities’ decision. It will consider in that light whether any and if so what further disclosure should be made. It will by no means necessarily conclude that any further disclosure was required.

34.
Here, Ouseley J was satisfied at trial that the in camera procedure was necessary and fair and on 27 February 2014 that it continued to be necessary and fair that there should be no disclosure of the in camera material. He was satisfied that there were “reasonable and solid grounds” for continuing non-disclosure. The reasonableness and proportionality of his conclusion have not been (at least as yet) challenged before the Divisional Court or therefore before the Supreme Court: para 20 above. But, even apart from that, I see no basis for concluding that the European Court of Human Rights would either inevitably or probably conclude that any further disclosure should be made to it. More

importantly, it will - as Ouseley J said in paras 64 to 66 of his judgment (para 16 above) - be for the European Court of Human Rights to decide at an appropriate time under article 38 whether any and if so what further disclosure should be made, rather than for the appellant to prejudge its view by insisting on such disclosure as of right under article 34; and it will then be for the United Kingdom to consider its position further. For this reason alone, I would therefore dismiss this appeal.

The domestic legal position

35.
In the light of the above, the question whether the English courts' domestic power to restrain disclosure of in camera material is limited by reference to any international obligation incumbent on the United Kingdom under article 34 does not necessarily arise. But I can consider it shortly. The United Kingdom takes a dualist approach to international law. The case does not concern the construction of a statutory right, duty or power which would otherwise be of uncertain scope in a context where it can be seen or presumed that Parliament intended the statute to comply with the United Kingdom's international obligations: see eg Garland v British Rail Engineering Ltd [1983] 2 AC 751, 771A-C per Lord Diplock, R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696, 747H-748A per Lord Bridge and Assange v Swedish Prosecution Authority [2012] UKSC 22; [2012] 2 AC 471. It concerns a general discretionary common law power, to be exercised in the light of all circumstances which the common law identifies as relevant. The starting point in this connection is that domestic and international law considerations are separate. In accordance with R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696, R v Lyons [2002] UKHL 44; [2003] 1 AC 976, para 13 and R (Hurst) v London Northern District Coroner [2007] UKHL 13; [2007] 2 AC 189, para 56, per Lord Brown of Eaton-under-Heywood with whose reasons Lord Bingham of Cornhill and Lord Rodger of Earlsferry agreed at paras 1, 9 and 15, a domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate.

36.
In relation to point (i), even the minority who have suggested that a domestic decision-maker should at least give consideration to international rights which can properly be regarded as fundamental go no further: see per Lady Hale and Lord Mance in Hurst at paras 18 and 78 to 79. Neither by reference to the principle of legality, which refers to rights and obligations recognised at a domestic level, nor on any other basis is it possible to limit the domestic court's general discretion by reference to unincorporated international obligations or to require Parliamentary authorisation before a court can consider whether it should in particular circumstances exercise such a discretion in a way which will or may prove inconsistent with such obligations. For completeness, I add that, in the light of the powers of the European Court of Human Rights under article 38, I would not regard any obligation (if any) which is regarded as existing at this stage under article 34 as fundamental in the sense under discussion in Hurst.

37.
In the present case Ouseley J did have regard to the United Kingdom's international legal position under articles 34 and 38, but made clear (inter alia) that, whatever the United Kingdom's obligations might prove to be at the international level, he did not consider the suggested relaxation of his order to allow disclosure in the appellant's response to be appropriate. That was in my opinion an orthodox approach to the exercise of his general discretion. He also made clear his willingness to reconsider the position further, in the circumstances indicated in paras 64 to 66 of his judgment (para 16 above).

38.
In these circumstances, and bearing in mind that the only issue now before the Supreme Court is whether Ouseley J had a common law power to maintain and expand his order for non-disclosure, so as to cover the appellant's application to the European Court of Human Rights, as he did on 27 February 2014, this appeal must also fail on the second ground.

Conclusions

39.
In the light of the above, the appellant has not made good the proposition which he needs to establish, namely that there are no circumstances in which refusal to permit disclosure of the in camera material to the European Court of Human Rights in the appellant's response could be justified. First, he has not established at the international level that the non-disclosure at this stage involves any breach by the United Kingdom of any obligation under article 34 of the Convention: see paras 24 to 34. Second, even if a contrary conclusion had been reached on the first point, it would not follow that the order maintained and made by Ouseley J on 27 February 2014 involved any breach of English law: see paras 35 to 38. It follows that, for each of these separate reasons, this appeal must be dismissed.