CASE NOTES

Human Rights – Fair Trial – National Security – In Camera Proceedings – Open Justice

Yam v United Kingdom (31295/11) (2020) 71 EHRR 4

European Court of Human Rights

Facts

In January 2020 the European Court of Human Rights (ECtHR) passed judgment in *Yam v United Kingdom* (31295/11) (2020) 71 EHRR 4, finding that the UK had not violated Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR) by holding a criminal trial partly in secret. The case raises a familiar issue which the courts – both domestic and European – have had to grapple with for decades, namely, how to balance an individual's right to a fair trial and the principle of open justice with national security concerns.

The case has a somewhat complex history in the UK with a series of appeals, specific interlocutory appeals, referrals, and judicial review challenges. The origins of the case can be traced to 2006 when the applicant, Wang Yam, was charged with murder, burglary, theft, handling stolen goods and fraud following the death of the writer Allen Chappelow in London. When his trial began at the Central Criminal Court in January 2008, it was ordered that part of the defence evidence was to be heard *in camera* – meaning in closed session where the press and public would be excluded – in the interests of national security and to protect the identity of a witness or other person. Although the exact reason for this was not disclosed, it was known that Yam was a former Chinese dissident and informant for the UK's Secret Intelligence Service "MI6".

Yam sought leave to appeal against the order for this evidence to be heard *in camera*, but this was refused by the Court of Appeal ([2008] EWCA Crim 269). Yam was found guilty of fraud, but the jury were unable to reach a verdict on the charges of murder, burglary and theft (Central Criminal Court, unreported, 1 April 2008). At the retrial, Yam was found guilty of murder and burglary (Central Criminal Court, unreported, 16 January 2009). Yam then sought leave to appeal his conviction, which was granted in part, but the appeal was subsequently dismissed on its merits ([2010] EWCA Crim 2072).

In 2011, Yam lodged his application with the ECtHR claiming that the secrecy of his trial had breached Article 6 of the ECHR, following which a further specific ground of complaint emerged. Relying upon Article 34 of the ECHR, which guarantees the right of individual petition, Yam wished to refer to the evidence given *in camera* in his submissions to the ECtHR, which the Central Criminal Court had prohibited. On this somewhat specific point and the Court's subsequent refusal to allow the publication of the material, Yam sought judicial review but was unsuccessful ([2014] EWHC 3558 (Admin)), and was again unsuccessful when he appealed to the UK Supreme Court ([2015] UKSC 76).

Lastly, in 2016 the Criminal Case Review Commission referred Yam's case back to the Court of Appeal after new witnesses and evidence emerged of a similar incident of violent mail theft in a neighbouring area to Yam's victim which occurred when Yam was in detention. The appeal was dismissed, however, with the Court finding that Yam's conviction had not been rendered unsafe, as there was no basis to conclude that the new evidence would or might reasonably have affected the jury's decision in this case ([2017] EWCA Crim 1414).

The decision of the European Court of Human Rights

At the ECtHR, Yam argued that the closed sessions violated his right to a fair and public hearing under Article 6(1), but also that his right to obtain the attendance of and to examine witnesses under the same conditions as those for the prosecution pursuant to Article 6(3)(d) had been violated. This was because, Yam argued, a fully public trial could have encouraged additional defence witnesses to come forward and prosecution witnesses would have been subjected to public scrutiny, thus presenting the possibility that his defence could have been further supported. At the same time, Yam argued that the UK had failed in its obligations under Article 34 of the ECHR to allow him to exercise his right of individual petition by refusing to allow him to disclose evidence heard *in camera* to the ECtHR.

The ECtHR found no violation of Articles 6(1) or 6(3)(d) of the ECHR. This was because Yam had been "fully involved in the procedure which led to the making of the *in camera* order", that "all the evidence concerning the reasons for the request was disclosed to him and his legal team", and he had "participated fully in the hearing on this matter before the trial judge where his counsel was able to oppose the request and cross-examine prosecution witnesses". Moreover the Court found that the numerous stages of Yam's legal challenge ensured that there had been rigorous and independent scrutiny of the decision to hold the trial partly in secret and that the closed sessions were limited and only applied to a specific part of the defence. On the issue of whether the closed sessions had prevented more defence witnesses coming forward, the ECtHR found this to be mere speculation as the "majority of the trial took place in public and it received a great deal of publicity at the time". Ultimately the ECtHR determined that there had not been any unfairness in the trial. On the specific ground of complaint pursuant to Article 34 about him being unable to disclose the evidence heard *in camera*, the ECtHR rejected this complaint and found that there had been "meaningful independent scrutiny of the asserted basis for the continuing need for confidentiality".

Analysis

The challenge of ensuring fairness and open justice whilst grappling with national security concerns is certainly not a new phenomenon for the courts. These issues have been particularly prevalent in recent cases involving terrorism, such as *Guardian News and others v Incedal and Rarmoul-Bouhadjar* ([2014] EWCA Crim 1861), which may have been the first entirely secret criminal trial in the UK before the intervention of several media corporations led to some details of the trial being made public, and *R. v Naweed Ali et al* (Central Criminal Court, unreported, 2 August 2017), which concerned a foiled terrorist plot. Cases of this nature raise significant problems for the principles of open justice, and to some extent the principles of natural justice and the equality of arms, all of which are pivotal to the common law notion of procedural justice which has heavily influenced the development of the ECHR (Ben Stanford, 'The Complexities of Contemporary Terrorism Trials Laid Bare' (2017) 181(33) *Criminal Law and Justice Weekly* 594-596). One thing common to these cases, including *Wang Yam*, was the hearing of some parts of the trial in closed session owing to the necessary disclosure of sensitive information.

It is a basic principle of open justice, engrained within the common law for centuries, that trials should be transparent and that the media and general public should not be excluded except in exceptional situations. However, as a limited right, the right to a fair trial under Article 6 of the ECHR allows the press and public to be excluded in certain situations. For a case of this kind involving issues of national security it is easy to see why, from the perspective of the UK

Government, closed sessions may have been necessary. In terms of natural justice and the equality of arms, it is a tenet of both principles that either side to a dispute must be able to identify the witnesses of the other side to be able to cross-examine them effectively. Article 6 of the ECHR does, however, allow witnesses to remain anonymous if their safety is threatened or if there are national security concerns at stake that would be jeopardised if that part of the trial was completely transparent.

As is well known, the ECtHR has traditionally granted a wide margin of appreciation on matters of national security, and in that respect the Court in *Yam* confirmed that it was "not well-equipped to challenge the national authorities' judgment that national security considerations arise". This factor, when combined with the similarly deferential approach generally adopted by domestic courts when national security issues arise, has led many to voice concerns that the creeping "normalisation" of secretive proceedings may be leading to a gradual erosion of long-held principles of open justice and natural justice. As Lord Neuberger acknowledged in *Al Rawi v Security Service* ([2010] EWCA Civ 482), which concerned the power of a court to order a closed material procedure for part of a trial, "it is a melancholy truth that a procedure or approach which is sanctioned by a court expressly on the basis that it is applicable only in exceptional circumstances nonetheless often becomes common practice".

In that respect, the use of closed material procedures (CMP) in British civil trials involving national security issues has particularly exposed how exceptional measures restricting traditional fair trial guarantees can take root and spread to other areas of law. With CMP, the individual might not be fully informed of the accusations, evidence or complete judgment, is excluded from closed sessions, and is not permitted any contact with their security-cleared lawyer once that lawyer has been served with the closed evidence. In other words, these proceedings are uniquely both *in camera* and *ex parte*. As a result, CMP pose serious problems not only for the principle of open justice, but also the principles of natural justice and the equality of arms.

Since the introduction of the procedures in 1997 for certain proceedings before the Special Immigration Appeals Commission, CMP have been authorised for use in the Investigatory Powers Tribunal, Parole Board hearings, asset-freezing and financial restrictions proceedings, and even employment tribunals amongst many other settings. Although these developments are all significant in their own right, the possibility for a court to authorise the use of CMP in *any* civil trial pursuant to the Justice and Security Act 2013 is the most significant extension. Specifically, this Act extends the possibility of implementing CMPs in any civil case following an application to the High Court, Court of Appeal, Court of Session, or Supreme Court. As legal practitioners and the public become more accustomed to the use of CMP in civil proceedings, the risks of such practices becoming normalised and spreading to other areas of law remains a significant possibility.

Thus far such drastic measures have not been adopted in criminal trials, in part due to the additional and stricter guarantees imposed by Articles 6(2) and (3) of the ECHR which reinforce the importance of natural justice in criminal proceedings, but also more generally because of the recognition of the potentially severe consequences for a defendant in a criminal trial. As such, with *in camera* proceedings the main issue of concern has centred on the principle of open justice.

Nevertheless, a Jeremy Bentham passage frequently mentioned by judges, journalists and academics alike warns against the dangers of secretive proceedings. Quoted by Lord Shaw in

Scott v Scott ((1913) AC 417), which is still today one of the most commonly referenced cases when closed sessions take place, Bentham said that "[i]n the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice". Clearly since then, the influence and domination of national security interests in some proceedings has imposed significant caveats upon this maxim.

Conclusions

As national security challenges emerge or evolve, so too will the issues for the courts to consider when balancing the rights of defendants and the principle of open justice with national security concerns. Certain aspects of the right to a fair trial, not least of all the principle of open justice and its related guarantees, have undoubtedly been subject to increased pressure and restrictions in recent years due to such interests. With both domestic and European courts generally adopting a deferential approach to government when natural security concerns arise, and with measures restricting open justice and natural justice being slowly normalised in civil proceedings, it will be essential for interested parties and the public more broadly to remain vigilant of these developments to protect the criminal legal system.

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