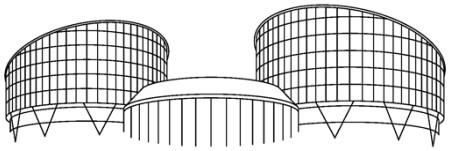

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF YAM v. THE UNITED KINGDOM

(Application no. 31295/11)

JUDGMENT

Arts 6 § 1 (criminal) and 6 § 3 d • Public hearing • Witnesses • Trial partly held *in camera* • In camera order subject to rigorous and independent judicial review fully involving the applicant • Ability to cross-examine prosecution witnesses not impaired

Art 34 • Hinder the exercise of the right of application • Domestic authorities' decision not to disclose *in camera* material in absence of request from the Court • Meaningful independent scrutiny

STRASBOURG

16 January 2020

FINAL

22/06/2020

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yam v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Krzysztof Wojtyczek, *President,*
Aleš Pejchal,
Armen Harutyunyan,
Pere Pastor Vilanova,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 10 December 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 31295/11) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Wang Yam ("the applicant"), on 28 April 2011.

2. The applicant, who was granted legal aid, was initially represented by Geoffrey Robertson QC and Kirsty Brimelow QC, instructed by Janes Solicitors, London. He was subsequently represented by Mr Edward Preston, of Edward Fail Bradshaw and Waterson solicitors, also based in London. The United Kingdom Government ("the Government") were represented by their Agents, Ms Y. Ahmed and, subsequently, Mr C. Wickremasinghe, both of the Foreign and Commonwealth Office.

3. The applicant alleged, relying on Article 6 of the Convention, that his trial for murder was unfair, in particular as a result of the trial judge's decision to hold part of the trial *in camera*.

4. On 7 December 2012 the Government were given notice of the application. On 24 August 2014 the application was adjourned pending domestic proceedings on disclosure of the *in camera* material to this Court.

5. On 26 April 2016, following a request by the applicant, the Chamber decided not to hold a preliminary hearing to determine whether an order preventing the applicant from submitting the *in camera* material to this Court was in breach of Article 34. It also rejected the applicant's request for a ruling that *in camera* material should be disclosed to the Court pursuant to Article 38 of the Convention.

6. In his written submissions dated 23 November 2018, the applicant repeated his requests for an oral hearing to consider whether there had been a breach of Article 34 and for an order under Article 38. On 10 December 2019 the Chamber decided not to accede to these requests.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The murder, the prosecution case and the defence

7. On 14 June 2006 the police attended the home of Mr A.C. after having been alerted by his bank to suspicious activity in his bank accounts and discovered his dead body. It seemed likely that he had been murdered at some point soon after 8 May 2006, the last date on which he was known to have been alive.

8. It emerged that at the start of May the victim had complained to the police about the theft of his post from his home. Further investigation revealed that the theft of post had continued until the discovery of his body.

9. On 15 June 2006 the neighbourhood postman told police that in around mid-May he had been approached by a man claiming to be the victim's nephew who had asked him if he had post for the victim. He had replied that he had been unable to deliver post because tree branches had been piled against the front door. The following day the branches had been cleared away. The postman took part in an identification procedure on 4 July 2006. After viewing the images he said that he was "not positive" but that the applicant was the only one who was like the picture in his mind. The policeman recorded it as less than a positive identification.

10. It also became apparent that between about mid-May and mid-June there had been quite extensive misuse of the victim's identity and bank accounts, apparently made possible by the theft of his post.

11. The applicant was subsequently charged with murder (count 1), burglary (count 2), theft (count 3), handling stolen goods (count 4) and two specific acts of fraud (counts 5 and 6). The prosecution case was that the theft of post, the identity fraud and the murder were connected events and had been carried out by the applicant acting alone. There was evidence pointing to the applicant's involvement in the misuse of the victim's bank accounts, cheques and credit card. The murder, it was alleged, had been committed when the applicant had encountered the victim at home unexpectedly while stealing his post. There was no direct evidence proving the applicant's involvement in the murder. The case against the applicant on this count was a circumstantial one.

12. The applicant admitted certain specific transactions involving the victim's cheques and his credit card, in respect of which there was clear proof of his involvement. However, he denied all other fraudulent use of the victim's identity or bank accounts. Regarding the transactions he admitted, he claimed that he had become involved with some gangsters who had passed him the cheques and the credit card. He said he had been playing them along to assemble evidence against them before reporting them to the

police. He named and described the gangsters and the places they frequented. He maintained that he had never met the victim or been to his home and that he was not responsible for murdering him.

B. The trial

1. The decision to hear part of the defence in camera

13. Prior to the start of the trial, the prosecution applied for part of the defence to take place *in camera*. A partly-private and partly-open hearing took place before the trial judge. Both sides were present at the private part of the hearing and counsel for the applicant cross-examined prosecution witnesses giving evidence in support of the application.

14. On 15 January 2008, the judge ordered that the part of the applicant's evidence concerning his explanation for acts admitted by him should take place *in camera*, in the interests of national security and to protect the identity of a witness or other person. He issued an open and a private judgment. In his open judgment, he explained that he had an inherent power to hold proceedings *in camera* where the interests of justice required it, but made it plain that the interests of justice could never justify such a course of action if the consequence would be that the trial would not be fair. He held that if the press and the public were not excluded from certain parts of the trial "serious risks would be taken". He stressed the possibility that the prosecution might drop the case altogether rather than incur those risks. He was of the view that if the press and public were excluded from the relevant parts of the defence, the trial would go ahead, the risks would not be taken and a fair trial would be possible. In the circumstances he found that the interests of justice required him to exclude the press and public from the relevant parts of the trial.

15. The applicant appealed the order. His counsel argued that the trial could not be fair without the presence of the press and public.

16. On 28 January 2008, the Court of Appeal upheld the order, delivering an open and a private judgment. In its open judgment, it found that for the reasons set out in its private judgment, the trial judge had correctly applied the relevant test and that his decision was correct.

2. The trial proceedings

17. The trial on the six charges in the indictment (see paragraph 11 above) took place between 28 January and 1 April 2008. In terms of the framing of the indictment, counts 2 (burglary) and 3 (theft) were alternatives, to cater for the possibility that the applicant had only stolen post protruding from the victim's letterbox and had not entered his home for that purpose. Count 4 (handling stolen goods) only arose for consideration if the jury acquitted the applicant on counts 2 and 3.

18. The prosecution case was that there had been extensive misuse of the victim's identity and bank accounts made possible by the theft of his post from his home, and that the thief was also the murderer. Evidence was led of the applicant's involvement in attempts to extract and control a large sum of money from the victim's bank accounts. There was CCTV evidence that he had paid a missing cheque into an account with no connection to the victim and he was proved to have used the victim's credit card on several occasions. There was also evidence of an attempt to deal with an electricity bill which had arrived after the victim's death, which it was suggested was proof that the fraudsman was attempting to delay discovery of the victim's body to enable the fraudulent activities to continue. The qualified identification of the applicant by the postman (see paragraph 9 above) was also admitted in evidence. The prosecution invited the jury to infer that the evidence of the applicant's sole involvement in the fraud meant that he must also be the murderer.

19. It had initially been envisaged that the applicant would give *in camera* only certain parts of his evidence related to his explanation for his use of the victim's cheques and credit cards. However, ultimately all of his evidence was heard *in camera* because he had difficulty keeping distinct the sensitive and non-sensitive aspects of his evidence. The applicant alleged that he had been supplied with the stolen material by gangsters. He named, during his evidence, the three gangsters concerned and their names were also mentioned in open court. The evidence of four prosecution witnesses called to rebut applicant's explanation for his admitted involvement was also heard *in camera*. The applicant and his counsel were present throughout the *in camera* proceedings. Counsel's speeches about the parts of the applicant's evidence which were not required to be given *in camera* were not dealt with *in camera*. Aside from its response to the applicant's defence, none of the prosecution evidence was heard *in camera*.

20. On 31 March 2008 the jury found the applicant guilty on counts 5 and 6 (specific acts of fraud). However, they were unable to reach a verdict on counts 1-3 (murder, burglary and theft). They were subsequently discharged in respect of these counts but were erroneously invited to give a verdict on count 4 (handling stolen goods), despite not having acquitted the applicant on counts 2 and 3 (see paragraph 17 above). On 1 April 2008 the jury found the applicant guilty of count 4.

3. The retrial

21. The prosecution sought a retrial on counts 1-3. The retrial took place between 13 October 2008 and 16 January 2009.

22. At the start of the retrial the defence argued that to try the applicant amounted to an abuse of process in light of the previous conviction on count 4, since prosecution on the remaining counts would be inconsistent with that verdict. The conviction, it was argued, necessarily meant that the

jury had considered him not guilty of theft or burglary. Since the prosecution case was that the thief was the murderer, the conviction on count 4 also precluded a finding of guilty in respect of the murder charge. The trial judge rejected the application. He found that the fact that a verdict had been received in relation to handling stolen goods did not preclude a trial for murder and burglary, even though the factual bases for both groups of offences were contradictory.

23. On 16 January 2009 the applicant was convicted of murder (count 1) and burglary (count 2). He was sentenced to life imprisonment with a minimum term of twenty years' imprisonment on the murder charge, and shorter concurrent sentences in respect of the other convictions.

C. Appeal against conviction and sentence

1. The 2010 appeal

24. The applicant sought leave to appeal his conviction and sentence. At a "rolled-up" hearing (i.e. a hearing to consider whether to grant leave, with examination of the merits to follow immediately if leave was granted), he relied on a number of arguments.

25. In so far as relevant to his present application, he argued, first, that the conviction on count 4 had relied on factual findings that were inconsistent with the factual findings required to sustain convictions for burglary, theft and murder. He claimed that his second trial had therefore been an abuse of process (see paragraph 22 above).

26. Second, the applicant contended that the closure of the trial to the public had jeopardised the fairness of proceedings. He submitted that had his evidence and the evidence of the four prosecution witnesses been heard in public, there was a real possibility that additional witnesses would have come forward in support of his defence and to provide good character evidence. He also claimed that the fact that the four witnesses had been heard in private had given their evidence additional standing.

27. Third, he submitted that the evidence of the postman should have been excluded as unfair.

28. Finally, while conceding that the evidence linking him to fraudulent use of the victim's identity and bank accounts was "compelling", he argued that there had been no evidence fit to be left to the jury from which it could make the step from thief and fraudsman to murderer.

29. On 5 October 2010 leave to appeal was granted in part and the appeal dismissed on its merits. The court refused leave to appeal against sentence.

30. As for the first ground (see paragraph 25 above), the court accepted that the verdict in handling stolen goods should not have been received at the first trial as there had not been an acquittal on the alternative counts of burglary and theft. It was, however, quite impossible to say that it had been

unfair or an abuse of process for the applicant to have been retried on counts 1-3. Rather, the court said, it would have been "contrary to all principle" to have refused to try him when there was a clear *prima facie* case against him and the first jury had been unable to agree. The conviction for handling stolen goods was accordingly quashed.

31. As to the argument that the *in camera* decision had resulted in a conviction which was not safe (see paragraph 26 above), the court considered that this could be no more than the merest speculation. It underlined that most of the trial had been conducted in public and that the applicant had been able to name the three alleged gangsters and provide a good deal of identifying material. The *in camera* order had initially been drafted so as not to cover that part of his evidence, expressly so that it could be heard by anyone who chose to be in court. It was because of the applicant's own inability to confine himself to that evidence that it had become necessary for all of his evidence to be heard in private. Nonetheless, the information concerning the alleged gangsters had been available to be put to several prosecution witnesses who had given evidence in open court. In addition, at the first trial the applicant's counsel had made a public opening statement to the court identifying the persons upon whom his defence had relied. The possibility had remained for this to be done in the second trial, although for tactical reasons it had not been taken up. The court was therefore unable to accept that there was a real possibility that other evidence would have emerged had there been further publicity and that such evidence would have been exculpatory. In respect of good character evidence, the court observed that there had been a great deal of character evidence available and that the trial judge had summarised it "very favourably" in his summing-up to the jury. The court did not agree that the fact that four prosecution witnesses had given their evidence in private had given it additional standing. Although the evidence had been heard in the absence of the public, the evidence-taking had otherwise proceeded in exactly the same way as for all other witnesses.

32. As regards the third ground (see paragraph 27 above), the court emphasised that the trial judge had properly directed the jury on the fact that the identification was only qualified. He had also been "at pains" to identify the features of the postman's evidence that might have been taken to point away from the applicant.

33. In respect of the final ground (see paragraph 28 above), the court agreed that the evidence connecting the applicant to the fraud was compelling. There had plainly been a case to be put to the jury, and the jury had been entitled to conclude that the long, detailed and thorough evidence demonstrated that the applicant had been the fraudsman, that his defence was untrue, and that he must have been the killer. The court further noted that the trial judge's direction on circumstantial evidence had been "impeccable".

2. The 2017 appeal

34. The Criminal Case Review Commission ("CCRC") subsequently referred the applicant's case back to the Court of Appeal on the basis of fresh evidence which had emerged of an incident of violent mail theft in the same area within a year of the murder. The applicant also put evidence of two further new witnesses, which suggested possible alternative perpetrators of the murder, before the Court of Appeal.

35. On 29 September 2017 the appeal was dismissed. The court summarised the extensive evidence which had led the jury to conclude that the applicant alone had committed the dishonest acts and that he was both the thief and the murderer, and said:

> "128. What emerges from the forensic analysis of the detail of the evidence which we have set out fully in this judgment, is the strength of the link between the activities undertaken by the Appellant and the death of the deceased. Many actions of the person using, or attempting to use, the deceased's identity can only be explained or understood if done by someone who knew of the death and with an interest in delaying discovery of it ... [T]he various elements of the detailed evidence combined to draw a unique connection between the Appellant and the death of [Mr A.C.]. It is that unique and personal connection which was at the heart of this case.
>
> 129. The jury were rightly directed that they needed to be sure about that unique connection before convicting the Appellant of murder. In returning their verdict, therefore, they clearly concluded that the web of activity undertaken by the Appellant in relation to the deceased's identity and accounts was so thoroughly interwoven with the murder itself that he, and only he, could have been responsible for the latter ..."

36. The court concluded that it could not find any respect in which the evidence of the new witnesses could have disrupted or diluted the unique connection between the applicant and the murder established by the existing evidence. There was no possibility of a different outcome and nothing to suggest that the conviction was unsafe.

D. Proceedings concerning disclosure of the *in camera* material to this Court

37. Meanwhile, in September 2013 the applicant applied to the trial judge to clarify or vary his 2008 *in camera* order (see paragraph 14 above) in order to permit references to the *in camera* material in the context of the applicant's written submissions to this Court. Counsel for the Attorney General, representing the public interest, produced a Public Interest Immunity Certificate signed by the Secretary of State for Foreign Affairs confirming the continuing public interest underlying the *in camera* order. The certificate was supported by a closed schedule, which was not provided to the applicant or his legal team.

38. In a judgment of 27 February 2014 the trial judge refused to vary the order to permit disclosure to this Court. He reviewed this Court's practice on public access to materials and hearings and considered the Court's

judgment in *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, ECHR 2013, in so far as it addressed a refusal of the respondent State to provide sensitive material requested by the Court. He noted that the obligations under Articles 34 and 38 of the Convention were binding on State parties and emphasised that it was for the Government to decide whether or not to comply with these obligations. He continued:

> "52. ... As I understand *Janowiec*, the Strasbourg Court does not rule out that a Government may, without breaching Articles 34 and 38, decline to provide otherwise relevant material, on the grounds of national security or other confidentiality, if it explains why and how that decision was arrived at. As I read paragraphs 205-215, and 213 especially, the Court may be persuaded by material of that nature that no requirement for it to be presented to the Court should be pursued. Although the Strasbourg Court regards the decision as one for it to take, it will take account of the extent to which an independent domestic court has examined the merits of the claimed national security or confidential interest and supported it. I do not read *Janowiec* as saying that the only effect of Strasbourg's acceptance of the need for the relevant interest to be protected is that the material should go through its own 'in camera' procedures; Strasbourg is bound to be alive to the legitimate sensitivities of governments in respect of such material ..."

39. The judge considered that in assessing whether there had been a failure to comply with the Convention in this respect, the Court would take into account independent scrutiny given to the assertion of a national security interest. He was of the view that applying the balancing exercise in *Janowiec and Others*, cited above, § 213, the balance clearly lay in favour of non-disclosure: without the *in camera* order, there might well have been no trial at all of the applicant on a very serious charge, and one which involved a serious breach of human rights. He continued:

> "61. The application to the ECtHR can raise the principle of hearing part of the trial in camera, although I accept that, without the 'in camera' material, it would not be as well placed as I was or the [Court of Appeal] to appreciate the insignificance for the fairness of the trial of the exclusion of the press and public from parts of it."

40. He accepted that the trial would have received more publicity had it been held fully in public, but emphasised that much of the evidence had not been given *in camera* and that the case, and the fact that part of the trial was to be heard *in camera*, had generated press publicity. The applicant's name and the names of all the alleged gangsters had been in the public domain. It was, he said, impossible to imagine that the gangsters would have come forward and it was pure speculation that a third party would have come forward. He added:

> "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 [the applicant's counsel] wishes to submit to the ECtHR.
>
> 64. I have also seen the amendments to that draft suggested by the Government which it would not contend breached the order at issue. 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."

41. The judge varied the order to make clear that disclosure of the *in camera* material to this Court was prohibited.

42. The applicant sought judicial review of the refusal. On 31 October 2014 the High Court dismissed the application and upheld the trial judge's ruling. It did not view the *in camera* material or the closed schedule.

43. In May 2015 the applicant was granted permission to appeal by the Supreme Court. On 16 December 2015 the appeal was dismissed. The court did not consider that failure to vary the order would inevitably breach Article 34, as this Court might not require disclosure in order to determine the Article 6 complaint. It had regard to *Janowiec and Others v. Russia*, cited above, § 213, and concluded that this Court would have due regard to the fact that in the present case the domestic courts had repeatedly found that disclosure of the sensitive material would not be in the national interest and that non-disclosure would not result in any unfairness to the applicant. In any case, the court found that as the domestic courts were not obliged to give effect to the United Kingdom's international obligations, even if the refusal to vary the order would be in breach of Article 34 that did not mean that it was in breach of domestic law.

II. RELEVANT DOMESTIC LAW AND PRACTICE

44. The general position in respect of public hearings is summarised by the decision of the House of Lords in *Scott v. Scott* [1913] AC 417 in which their Lordships held that "every Court of justice is open to every subject of the King".

45. At common law the court has an inherent power to hold hearings *in camera* where necessary in the interests of justice. The position was clarified in the decision in of the House of Lords in *Attorney-General v. the Leveller Magazine* [1979] AC 440, in which their Lordships stated that the general rule of open justice could be departed from:

> "... where the nature or circumstances of the particular proceedings are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest... [W]here a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes to be necessary in order to serve the ends of justice."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION AS A RESULT OF THE DECISION TO HOLD PART OF THE TRIAL *IN CAMERA*

46. The applicant complained that the hearing of evidence *in camera* had led to his trial being unfair, particularly in that it had compromised his right to defend himself and altered the perception of the witnesses contrary to Article 6 §§ 1 and 3 (d), which read as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... [T]he press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

A. Admissibility

47. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

48. The applicant argued that the nature and circumstances of the proceedings against him, and his defence, were such that had the evidence concerned been heard in public there would have been considerable media coverage of the proceedings. This could have encouraged additional defence witnesses to come forward and would have placed prosecution witnesses under public scrutiny. In particular, there was a real possibility that witnesses able to substantiate his defence would have made themselves known. The appearance of two further witnesses in 2017 following continued media coverage about the case supported the submission that the *in camera* nature of the trial proceedings had prevented witnesses from coming forward (see paragraph 34 above). The defence had therefore been

impaired because the applicant had been unable to challenge the case against him and present an alternative explanation. Further, since the prosecution case had been conducted in public, the applicant had not been able to examine his defence witnesses under the same conditions as those for the prosecution. On that basis, the principle of equality of arms had also been violated.

49. The applicant's written observations dated 23 November 2018 focussed on the CCRC referral and subsequent 2017 appeal, and on his attempts to obtain permission to disclose the *in camera* material to this Court. He did not make any substantive submissions concerning the underlying alleged violations of Article 6. He claimed that he was precluded by the *in camera* order from setting out material which would fundamentally inform this Court's assessment of the Article 6 matters.

50. The Government refuted the suggestion that the applicant's defence had been in any way prejudiced by the decision to hold part of it *in camera*. They underlined that the decision itself had been lawful, that the exclusion of the press and the public had been consistent with the terms of the express restrictions in Article 6 § 1, that the defence had been fully aware of the reasons for the order which had been made after a hearing in which they had participated, and that the order had been reviewed by the Court of Appeal. The trial judge had concluded that the trial would be fair even if the order were made. The applicant's argument that had the trial been public more witnesses would have come forward was at best highly speculative. The central themes of the applicant's defence had been advanced in public and the Court of Appeal had reviewed the fairness of the trial.

51. The Government did not accept that the exclusion of the press and the public had had any bearing on the conditions under which witnesses were examined. The applicant had been entitled to have the witnesses examined by his counsel in the usual way, they had been permitted to give admissible evidence and had been cross-examined in the usual manner. The process through which the jury had received evidence from prosecution and from defence witnesses had been exactly the same.

2. The Court's assessment

(a) General principles

52. As the Court has repeatedly explained, the public character of judicial proceedings required by Article 6 § 1 protects litigants against the administration of justice in secret with no public scrutiny. It is one of the means by which confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of a fair trial (see *Martinie v. France* [GC], no. 58675/00, § 39, ECHR 2006 and *Diennet v. France*, 26 September 1995, § 33, Series A

no. 325-A). There is a high expectation of publicity in ordinary criminal proceedings (*Belashev v. Russia*, no. 28617/03, § 79, 4 December 2008).

53. Article 6 § 1 does not, however, prohibit courts from derogating from the requirement to hold hearings in public where the special features of the case justify such a course of action. It expressly permits the press and the public to be excluded from all or part of a trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

54. In practice, the Court, in interpreting the right to a public hearing, has applied a test of strict necessity whatever the justification advanced for the lack of publicity (see, for example, *Diennet*, § 34, *Martinie*, § 40, and *Belashev*, § 83, all cited above). Thus before excluding the public from criminal proceedings, the national court must make a specific finding that exclusion is necessary to protect a compelling governmental interest and must limit secrecy to the extent necessary to preserve that interest (see *Belashev*, cited above, § 83).

55. The Court's usual approach in such cases is to analyse the reasons for the decision to hold a hearing *in camera* and assess, in the light of the facts of the case, whether those reasons appear justified. However, the application of a strict necessity test can present particular challenges when the ground invoked for holding part of a trial *in camera* concerns national security. The sensitive nature of national security concerns means that the very reasons for excluding the public may themselves be subject to confidentiality arrangements and respondent Governments may be reluctant to disclose details to this Court. Such sensitivities are, in principle, legitimate and the Court stands ready to take the necessary steps to protect secret information disclosed by the parties in the context of proceedings before it. But in some instances even these confidentiality guarantees may be considered insufficient to mitigate the risk of serious damage to fundamental national interests should information be disclosed. It may therefore arise, as in the present case, that the Court is asked to assess whether the exclusion of the public and the press met the strict necessity test without itself having access to the material on which that assessment was made at the domestic level.

56. The Court is not well-equipped to challenge the national authorities' judgment that national security considerations arise (*Janowiec and Others*, cited above, § 213). However, even where national security is at stake, 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. In cases where the Court does not have sight of the national security material on which decisions restricting human rights are based, it will therefore scrutinise the national decision-making procedure

to ensure that it incorporated adequate safeguards to protect the interests of the person concerned (see, *mutatis mutandis*, *Janowiec and Others*, cited above, § 213; *Fitt v. the United Kingdom* [GC], no. 29777/96, § 46, ECHR 2000-II; and *Regner v. the Czech Republic* [GC], no. 35289/11, § 149, 19 September 2017).

57. It is also relevant, when determining whether a decision to hold criminal proceedings *in camera* was compatible with the right to a public hearing under Article 6, whether public interest considerations where balanced with the need for openness, whether all evidence was disclosed to the defence and whether the proceedings as a whole were fair (see *Welke and Białek v. Poland*, no. 15924/05, § 77, 1 March 2011).

(b) Application of the general principles to the facts of the case

58. In the present case, the open judgments make it clear that the decision to hold part of the applicant's trial *in camera* was made, *inter alia*, for reasons of national security (see paragraphs 14 and 16 above). However, because of these national security concerns, the Court has not been provided with the detailed justification for the decision. The national decision-making procedure therefore takes on a particular importance (see paragraph 56 above).

59. It is noteworthy that from the outset the applicant was fully involved in the procedure which led to the making of the *in camera* order. All the evidence concerning the reasons for the request was disclosed to him and his legal team. He 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 (see paragraph 13 above).

60. In granting the prosecution request, the trial judge carefully balanced the need for openness against the national security interests at stake. He underlined that the interests of justice could never justify a decision to hold a trial *in camera* if the resulting trial would not be fair. He made the order only after having satisfied himself that the applicant could nonetheless have a fair trial (see paragraph 14 above). The applicant had access to the closed judgment of the trial judge setting out in full why it had been decided that part of the hearing should take place in private.

61. The decision to allow part of the defence to be held *in camera* was reviewed on appeal, first in the context of an interlocutory appeal in 2008 and again in 2010, this time specifically from the perspective of whether it had rendered the trial unfair (see paragraphs 16 and 31 above). The Court of Appeal upheld the decision of the trial judge and underlined that, in the result, it had not led to any unfairness in the proceedings. It is also worth noting that the justification for and necessity of maintaining the confidentiality of the material were considered again some years later when the trial judge was asked by the applicant to clarify or vary his order to enable disclosure to the Court in the present proceedings (see

paragraphs 38-40 above). There is therefore no doubt that the national security grounds, the need for secrecy, the lawfulness of the decisions taken and the impact on the fairness of the applicant's trial were subject to rigorous and independent scrutiny by judges on a number of occasions.

62. It is also significant that the *in camera* order was limited to the extent necessary to protect the interests at stake and applied only to a specific part of the applicant's defence (see paragraphs 19 and 31 above). The vast majority of the trial – and the whole of the prosecution's positive case – was held in public (compare *Belashev*, cited above).

63. Before this Court, the applicant cites two specific ways in which, he claims, the making of the *in camera* order rendered his trial unfair: the lost opportunity for defence witnesses supporting his version of events or providing good character evidence to come forward; and the additional standing he claims prosecution witnesses' evidence was given by their *in camera* testimony.

64. As to the suggestion that further witnesses would have come forward with evidence which might have materially assisted the defence, the Court agrees with the domestic courts that this can only be speculation (see paragraphs 31 and 40 above). The majority of the trial took place in public and it received a great deal of publicity at the time, not least because of the unusual decision to hold part of it in private. The general thrust of the applicant's defence was also public, and what information was publicly available was more than adequate to enable those with knowledge of the applicant having received stolen items from named gangsters, or the alleged gangsters themselves, to come forward. It appears that, despite the further publicity in light of the applicant's second appeal in 2017, no such witnesses came forward. For the same reasons, the small part of the trial heard *in camera* could have no conceivable impact on whether witnesses with good character evidence came forward. In any case, there was already a substantial amount of character evidence, both good and bad, before the jury which was very favourably summarised by the trial judge (see paragraphs 31 and 40 above).

65. The Court further does not accept that the order had any effect on the applicant's ability to have examined prosecution witnesses. The manner in which evidence was taken from them and put before the jury was exactly the same as for all other witnesses in the case. The applicant has not explained how the presence or absence from the courtroom of the press and public could have any possible bearing on the standing of witnesses' evidence.

66. The Court notes the applicant's argument in his 23 November 2018 observations that he has been prevented, because of the order prohibiting disclosure of the *in camera* material, from setting out material which would fundamentally inform this Court's assessment of these issues (see paragraph 49 above). However, it is striking that in these observations he

made no substantive arguments whatsoever as regards his complaints about the fairness of his criminal trial. This is notwithstanding the fact that the trial judge considered that draft observations which conveyed "something of the flavour of the envisaged submissions" and would put the Court in a better position to judge the relevance of the *in camera* material could have been submitted to this Court compatibly with his order (see paragraph 40 above).

67. In conclusion, the Court is satisfied that the request to hold part of the applicant's trial *in camera* was subject to a thorough and independent review at national level. The applicant participated fully throughout the review procedures and the justification for holding part of the trial *in camera* was examined in detail on several occasions. The order itself was limited in scope and none of the prosecution evidence or the evidence supporting the request for an *in camera* hearing was withheld from the applicant. The applicant was able to have cross-examined all prosecution witnesses. There is nothing to suggest that the order resulted in any unfairness to the applicant during the trial proceedings.

68. There has accordingly been no violation of Article 6 §§ 1 or 3 (d) of the Convention in this respect.

II. OTHER ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

A. Concerning the applicant's trial

69. The applicant contended that his retrial on counts 1-3 of the indictment (murder, burglary and theft) was an abuse of process and violation of the principle of *autrefois acquit* in light of his previous conviction on count 4 (handling stolen goods) (see paragraph 22 above). He further argued that the admission of the identification evidence of the postman (see paragraph 9 above) unfairly prejudiced him in the eyes of the jury and that the unfairness could not be adequately remedied through cross-examination. Finally, he contended that his trial was unfair because his conviction was based on circumstantial evidence. Again, he claimed that he was precluded by the *in camera* order from setting out material which would fundamentally inform this Court's assessment of these issues.

70. The Government pointed out that these complaints were all considered and determined by the Court of Appeal. The applicant had made no reference to case-law of the Court which might be said to support any of his arguments. The Government's position was that they were manifestly ill-founded.

71. As regards the applicant's argument that the *in camera* order prevented him from setting out relevant material in support of his complaints, the Court refers to its observations above (see paragraph 66).

72. On the substance of the complaints, it is clear that the jury in the first trial were unable to reach a verdict of guilty or not guilty on counts 1-3 of the indictment (see paragraph 20 above). The applicant had therefore not previously been acquitted by the time the second trial commenced. In so far as the applicant considers that his conviction on count 4 was inconsistent with his later convictions on counts 1 and 2, the Court notes that the former conviction was quashed by the Court of Appeal in 2010 (see paragraph 30 above).

73. As regards the evidence in the case, it is not the role of the Court to determine, as a matter of principle, whether particular types of evidence may be admissible (see *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08 and 3 others, § 254, 13 September 2016). The admission of the qualified identification by the postman does not pose any issue under Article 6 merely because the identification was a qualified one. The question is whether the proceedings as a whole were fair. In this respect, the Court observes that the jury were made aware of the extent of the identification by the postman and that the judge's summing up clearly highlighted its limitations, by reference to the earlier description provided by the postman and its inconsistency in some respects with the applicant's features (see paragraph 32 above). There is no suggestion that the applicant was unable to dispute the postman's evidence.

74. Nor is it for the Court to say whether the evidence, taken as a whole, was sufficient for a conviction on the charge of murder. The Court is not a court of appeal from the national courts and it is not its function to deal with errors of fact or law allegedly committed by a national court unless, and in so far as, they may have infringed rights and freedoms protected by the Convention (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 186, 6 November 2018). The applicant does not contest before this Court the quality or reliability as such of the evidence led by the prosecution to support the charges, nor does he suggest that he was unable to challenge its authenticity or oppose its use during the trial proceedings. The applicant's counsel accepted that the evidence connecting the applicant to the fraud was "compelling" and the Court of Appeal considered that there was plainly a case to answer on the charge of murder (see paragraph 33 above). When considering in 2017 whether the fresh evidence rendered the applicant's conviction unsafe, the Court of Appeal again underlined the strength and sufficiency of the evidence in the case. In particular, it highlighted the "unique and personal connection" between the applicant and the death of Mr A.C. established by the evidence led at his trial (see paragraph 35 above).

75. In these circumstances the applicant has failed to make out any arguable complaint of unfairness arising from the retrial on counts 1-3, the admission of the qualified identification evidence or the circumstantial nature of the case against him as regards the murder charge. Accordingly,

these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Concerning the 2017 appeal proceedings

76. In his observations dated 23 November 2018, the applicant complained about the 2017 appeal proceedings before the Court of Appeal and argued that they had breached his Article 6 rights. The Government contended that the complaint was inadmissible for failure to comply with Article 35 § 1 of the Convention.

77. While nothing prevents an applicant from raising a new complaint in the course of the proceedings before the Court, such a complaint must, like any other, comply with the admissibility requirements (*Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 135, 20 March 2018).

78. In so far as the applicant purports to have sought to put before the Court in the course of his November 2018 written submissions a Convention complaint in respect of the 2017 appeal proceedings, the complaint was made well out of time since the appeal was dismissed on 23 September 2017. It is accordingly inadmissible for failure to comply with the six-month time-limit set out in Article 35 § 1 of the Convention.

III. ALLEGED HINDRANCE OF THE RIGHT OF INDIVIDUAL PETITION IN ARTICLE 34 OF THE CONVENTION

79. In his written observations to the Court dated 23 November 2018, the applicant submitted that the actions of the Government and the domestic courts, in refusing and prohibiting disclosure of the *in camera* material, were interfering with his rights under Article 34 of the Convention. He requested a declaration that his Convention rights had been violated because these actions had hindered the effective exercise of his right of petition to the Court. The Government did not comment directly on this allegation.

80. The Court reiterates that, by virtue of Article 34 of the Convention, Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of the right of individual application. 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, may fall foul of its obligations under this Article (see *Janowiec and Others*, cited above, § 209).

81. In the present case, having being invited by the applicant to request the *in camera* material under Article 38 of the Convention, the Court declined to do so (see paragraph 5 above). The fact that, despite an invitation by the applicant, no request for particular documents has been

made by the Court will, in most cases, be fatal to a related allegation of a failure to comply with Article 34 obligations.

82. In any event, as the Court explained in *Janowiec and Others*, cited above, § 214, even where such a request has been made and refused, there will not necessarily be a failure to comply with Article 34 obligations if measures affecting fundamental human rights have been subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. In the present case, as explained above, the decision to hold part of the trial *in camera* met this requirement (see paragraphs 58-67 above). The decision to maintain the confidential nature of the *in camera* material in respect of the proceedings before this Court was reviewed, in proceedings in which the applicant participated, at three levels of jurisdiction (see paragraphs 38-43 above). The courts handed down judgments explaining clearly why the material should remain confidential and why they did not consider it appropriate to vary the order to allow disclosure to this Court. It is clear that, in contrast to *Janowiec and Others*, there was meaningful independent scrutiny of the asserted basis for the continuing need for confidentiality.

83. In view of the foregoing, the Court finds that the respondent State has not failed to comply with its obligations under Article 34 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the decision to hold part of the trial *in camera* and its impact on the fairness of the proceedings admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds* that the respondent State has not failed to comply with its obligations under Article 34 of the Convention.

Done in English, and notified in writing on 16 January 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Krzysztof Wojtyczek President