Case Summary

J and Others v Commissioner of Police

HCCM 191/2021; [2021] HKCFI 3586; [2021] 5 HKLRD 708
(Court of First Instance)
(Full text of the Court's ruling in English at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=140487&QS=%28HCCM%7C191%2F2021%29&TP=JU)

Before: Hon Alex Lee J
Date of Hearing: 27 October 2021
Date of Ruling: 29 November 2021

Production order ("PO") – criteria under s. 3(4) of Sch. 7 to IR – reasonable grounds for suspecting – reasonable grounds for believing as a higher threshold – Court's discretion in refusing PO restricted – integrity and effectiveness of investigation not to be compromised – whether compliance oppressive to subject of PO

Variation of PO – application on grounds of relevancy or utility generally not entertained – compromising integrity and effectiveness of investigation – latitude to Police on relevancy and utility at investigation stage – reconsideration of balance of public interest under s. 3(4)(d) of Sch. 7 permissible – confidentiality assurance/duty not excuse from compliance of PO – public interest in detection and prosecution of serious crime outweighed suspect's privacy right

Background

1. The Commissioner of Police ("the CP") obtained production orders ("POs") against the five Applicants pursuant to s. 3(2) of Sch. 7 (Rules Relating to Requirement to Furnish Information and Produce Materials) of the Implementation Rules for Article 43 of the NSL ("IR"), requiring the Applicants, all being trustees of an association, to produce the materials specified in the POs, including management accounts,

accounting ledgers, transaction records, particulars of donors, and details of donations/subsidies recipients. The Applicants took out a variation summons and a time summons, seeking redaction of the personal data of donation/subsidy recipients from some of the documents covered by the POs, namely, telephone numbers, residential addresses, email addresses, the last four digits of their identification documents, prisoners' numbers and particulars of psychological and medical treatments.

Major provision(s) and issue(s) under consideration

- BL 30
- IR, Sch. 7, ss. 2 and 3
- BOR 14
- Personal Data (Privacy) Ordinance (Cap. 486), s. 4 and Sch. 1, s. 3(1)

2. The Court examined the following issues:

(a) whether the Court, having ordered the issue of a PO, should entertain an application for variation on the grounds of relevancy under s. 3(4)(c)(i) of Sch. 7 of the IR; and

(b) whether the Court should accept the Applicants' invitation to re-conduct the balancing exercise under s. 3(4)(d) of Sch. 7 of the IR and allow their application for redaction of personal data.

3. Since the documents in dispute in both redacted form (as proposed by the Applicant) and in unredacted form (but sealed in the presence of the parties' representatives) had been produced to the Police, it would not be necessary for the Court to rule on the time summons for extension of time for compliance with the POs if the Applicants' request for redaction was either totally acceded to or rejected. (para. 7)

Summary of the Court's rulings

Statutory criteria in s. 3(4) of Sch. 7 of the IR

4. Because of the coercive and potentially intrusive nature of the special powers contained in Sch. 7, a judicial safeguard (in the form of

prior authorization) was put in place to ensure that the use of those special powers was not unwarranted or oppressive. This prior judicial authorization provided an opportunity for the conflicting interests of the State and the individual to be assessed before the event so that the individual right to privacy (guaranteed by BL 30 and BOR 14) would be breached only where the appropriate standard had been met. The court must approach an application for PO judicially with an independent mind balancing the conflicting interests. (para. 14)

5. Since the investigation was said to be into a person's proceeds of a suspected offence endangering national security, a major purpose of the POs was to facilitate police investigation into the fund flow and the reasons for payments. These were important factors to be taken into account when the court was weighing the public interest under s. 3(4)(d) of Sch. 7. (para. 16)

6. The threshold for s. 3(4)(b), namely "reasonable grounds for suspecting", at the investigatory stage was relatively low: "suspicion" being a state of conjecture or surmise where proof was lacking and was a far cry from *prima facie* proof. However, it required additionally that the "suspicion" was based on "reasonable grounds" so that anyone looking at those grounds objectively would so suspect. (para. 16)

7. The threshold of "reasonable grounds for believing" applicable to both s. 3(4)(c) and (d) was higher than that of "reasonable grounds for suspecting" applicable to s. 3(4)(b) because "belief", though less than "knowledge", was more than "mere suspicion". (para. 18)

8. When considering an application under s. 3(2) at the *ex parte* stage, the court was not tasked to make any "findings of fact" as such but to form an objective assessment of the statutory criteria based on the limited information available and ask whether any reasonable man looking at that information objectively would have the requisite suspicion or belief. (para. 18)

Application for variation on the grounds of relevancy under s. 3(4)(c)(i) of Sch. 7

9. The court retained a discretion not to order a PO even though all the statutory criteria contained in s. 3(4) of Sch. 7 were met. However, the room for exercising this discretion was restricted and the justification for refusal had to be strong. This was in view of the plain statutory intent that the integrity and effectiveness of the investigation should not be compromised. (para. 20)

10. In *P v Commissioner of the ICAC* (2007) 10 HKCFAR 293, the CFA, in the context of the Prevention of Bribery Ordinance (Cap. 201) ("the POBO"), held that where the statutory criteria were satisfied, the test for the exercise of the discretion to refuse an order to provide information or to produce document sought by the ICAC was whether compliance with the notice served under s. 14(1)(d) of the POBO would be oppressive to the subject. Further, the court might discharge the s. 14(1)(d) notice *ex parte* order on the ground that the order was invalid as it went beyond what was contemplated by the statute, or on the ground of fraud. The latter ground would involve the proof of bad faith and the cases in which this could properly be alleged would be rare. Moreover, the CFA held that an application for variation should not be entertained when it related to the substance of the investigation, as it might run the risk of compromising the integrity and effectiveness of the investigation. (paras. 20, 21 and 23)

11. By reason of the utmost importance of national security and since s. 3(4)(c)(i) of Sch. 7 of the IR was similar in terms and purpose to s. 14(1B)(b) of the POBO insofar as both of them concerned the potential relevancy of the material to the investigation, what the CFA said in *P's case* about not compromising the integrity and effectiveness of the investigation by the ICAC applied equally, if not with greater force, to a PO issued under Sch. 7 of the IR. The same could be said about s. 3(4)(d)(i) of Sch. 7 which was about the potential utility of the material sought by the Police. (paras. 22 and 24)

12. At the investigation stage some latitude had to be given to the Police and due weight should be given to them as to what was likely to be relevant or useful, both of them pertaining to the substance of the investigation. The court should not impede on existing criminal investigation and should not be required to carry out the impossible task

of determining prematurely what was relevant or useful to the investigation. As to this, an analogy could be drawn between a PO and a search warrant. However, a bare assertion by a police officer even in cases involving national security would not suffice. (para. 24)

13. The Court concluded that, as a matter of principle, the court generally should not entertain an application or invitation to discharge or vary POs on the ground of relevance or utility, when there had already been a decision by the court on those at the *ex parte* stage. (para. 26)

Re-conducting the balancing exercise under s. 3(4)(d) of Sch. 7 of the IR

14. Although a PO should not be subject to challenge on grounds relating solely to the substance of investigation, in fulfilment of the court's role as the final safeguard against abuse and oppression, it was permissible for the court to re-conduct the balancing exercise under s. 3(4)(d) of Sch. 7 when facing an application for discharge or variation. (para. 28)

15. The countervailing interests relevant to the balancing exercise under s. 3(4)(d) of Sch. 7 were: (a) the potential utility of the personal data of the donation/subsidy recipients; and (b) the privacy right of the recipients and the corresponding duty of confidentiality on the Applicants. (para 27)

16. By virtue of s. 2(4)(d)(iv) of Sch. 7, confidentiality and privacy were matters which the court was entitled to take into account when considering whether or not to grant a PO under Sch. 7. (para. 12)

17. The task of the court was to perform an objective assessment of the requirements of s. 3(4)(d) of Sch. 7, taking into account also the affirmation evidence filed by the subject, but without the application of a burden of proof. (para. 28)

18. Having re-conducted the balancing exercise, the Court concluded that the balance of public interest clearly tilted in favour of production and that the Applicants' application for redaction had no merits for the

following reasons. (paras. 29 and 37)

(a) By virtue of s. 3(11)(b) of Sch. 7, the fact that the Applicants might breach their assurance of confidentiality given to the donations/subsidies recipients was in itself not sufficient to excuse them from compliance. (para. 30)

(b) It was self-evident that a PO, by its very design, would involve seeking information from parties other than its owners and without their consent. This coercive feature was not unique to the IR regime and was common to other similar statutory regimes. In case a PO might be obtained pursuant to a number of separate statutes, the investigating authority could choose whichever provision most conveniently suited its purpose, provided only that the conditions precedent prescribed by that statute were met. (para. 31)

(c) The equitable duty of confidence did not bar the disclosure to investigatory or regulatory authorities of matters that were within the province of those authorities to investigate. Compliance with Data Protection Principle 3 under the Personal Data (Privacy) Ordinance (Cap. 486) was exempted where the use of the personal data was for the prevention or detection of crime or where the use was by an order of a court. The courts had consistently held that the public interests in having serious crimes detected and prosecuted outweighed a suspect's right to privacy. This must apply, all the more so, to conduct endangering national security which struck at the foundation of "one country, two systems" upon which the very existence and stability of Hong Kong as a Special Administrative Region depended. (paras. 32 and 33)

(d) The balancing exercise should be re-conducted having regard to the purpose of the investigation which was to look at the fund flow and to see if the payments were genuine and for legitimate purposes. In this light, the personal data sought by the Police were plainly relevant. (para. 34)

(e) Section 4 of Sch. 7 contained provisions which restricted the dissemination of information obtained by the Police under ss. 2 and 3. There was no basis for the Applicants to worry that the personal data, once produced to the Police, would be made available to the public. (para. 35)

(f) Apart from the assurance of confidentiality given to the donations/subsidies recipients, the Applicants had not shown any difficulties for them to comply with the POs. (para. 36)

19. In conclusion, the Court dismissed both the variation summons and the time summons. (para. 38)

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