Case Summary

Lai Chee Ying (黎智英) v Commissioner of Police

HCMP 1218/2020 & HCAL 738/2022;
[2022] HKCFI 2688; [2022] 4 HKLRD 582; [2022] 6 HKC 414
(Court of First Instance)
(Full text of the Court's judgment in English at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=146837&currpage=T)

Before: Hon Wilson Chan J

Date of Hearing: 22 August 2022

Date of Judgment: 30 August 2022

Application for leave to judicial review – validity of search warrant by Magistrate under s.2 of Sch.1 to IR – Pt XII of IGCO not the sole lawful regime to protect journalistic materials ("JM") – IGCO regime not applicable to IR which was not ordinance – separate and additional powers under NSL and IR in cases concerning NSL offences – no blanket prohibition against production of JM for protection of press freedom – balancing competing interests with JM as a relevant but not a paramount consideration – likely JM to be brought to attention of Magistrate – principle of legality – search warrant valid

Meaning of "specified evidence" under s.1 of Sch. 1 to IR – natural and ordinary meaning – all types of materials containing evidence of offence endangering national security – provision of wider investigatory measures – JM covered – legally privileged materials also covered but subject to the exception to disclosure

Background

1. The Commissioner of Police obtained a search warrant from a

Magistrate under s. 2 of Sch. 1 of the Implementation Rules for Article 43 of the NSL ("IR"), which authorized the search of the digital contents of two iPhones seized from the Plaintiff's residence, including those that were subject to claims of journalistic materials ("JM"). To give effect to the search warrant, the Commissioner of Police applied to a Judge by summons for the digital contents which had been sealed to be made available to the Police.

2. In response, the Plaintiff applied for leave for judicial review against the validity of the search warrant on the ground that, as a matter of construction, the term "*specified evidence*" as defined in s. 1 of Sch. 1 of the IR (i.e. "anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security") did not cover JM, so that the Magistrate did not have power to order the search and seizure of JM.

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

- BL 27 and 35
- NSL 43 and 62
- IR, Sch. 1, ss. 1 and 2; Sch. 6; and Sch. 7
- Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"), Part XII

3. In refusing leave for the judicial review sought by the Plaintiff and allowing the summons taken out by the Commissioner, the Court discussed:

(a) the Plaintiff's construction of the term "*specified evidence*" as defined in s. 1 of Sch. 1 of the IR; and
(b) whether the Magistrate erred in authorizing the search and seizure of JM under s. 2 of Sch. 1 of the IR.

Summary of the Court's rulings[*]

(a) The Plaintiff's construction of the term "specified evidence" in s. 1 of Sch. 1 of the IR

4. The Plaintiff's argument was that Part XII of the IGCO was the only lawful regime to protect JM. Press freedom meant that the IGCO regime was the only route by which law enforcement officers might obtain a search warrant covering JM. Hence Sch. 1 of the IR could not cover JM and "*specified evidence*" defined in s. 1 of Sch. 1 did not include JM. The warrant was unlawful insofar as it authorized the seizure of JM as "*specified evidence*".

5. The Court held that the Plaintiff's argument above was completely untenable. (para.16)

(a) Part XII of IGCO could not be taken as the only way in which procedural safeguards could be meaningfully imposed in relation to the search and seizure of JM. (para. 10)

(i) JM as a relevant consideration in the exercise of its discretion could be duly taken into account by the court under Sch. 1 or Sch. 7 of the IR.

(ii) The IGCO was not applicable as the IR were not an Ordinance.

(iii) The Plaintiff's assertion that the courts had no jurisdiction over JM under Sch. 1 of the IR would result in deprivation of the court's jurisdiction under the NSL and the IR.

(b) Press freedom did not equate any blanket prohibition against the seizure, production or disclosure of JM. (para. 11)

(i) The protection of JM was not absolute for sometimes it might be in the public interest that JM should be seized

[*] Editor's note: The Plaintiff appealed against the Judge's decisions but the appeal was dismissed by the CA in *Lai Chee Ying v Commissioner of Police* [2022] HKCA 1574.

or exposed.

(ii) Notwithstanding BL 27 guaranteeing freedom of the press, JM could not be regarded as a paramount consideration in carrying out the balancing exercise between competing interests (i.e. the freedom of the press seen against the need to effectively investigate and deal with crime).

(iii) JM was no more than a relevant consideration in the exercise of the court's discretion.

(iv) The law had not developed or crystallised the confidential relationship in which journalists stood to an informant into one of the classes of privilege known to the law.

(v) It had never been the law that, save where some form of balancing exercise was specifically prescribed in the same legislation, the default position was that any statutory power ordering disclosure or production etc. must automatically be construed as excluding JM from its scope of application.

(c) The Plaintiff's attempted comparison between JM and legal professional privilege ("LPP") was inapt. Unlike JM, LPP was entrenched by BL 35 and did not involve a balance of interests. (para. 12)

(d) The NSL or the IR operated separately and additionally to the IGCO regime. (para. 13)

(i) By the clear wording of NSL 43, the NPCSC intended to confer on the Police additional powers in handling cases concerning offence endangering national security. The Police was vested with power both under the NSL and the Police Force Ordinance (Cap. 232) in investigating offences endangering national security, and was entitled to invoke both powers in their investigations.

(ii) Sch. 6 of the IR specifically referred to JM which was

expressly defined as having the meaning given by s. 82 of the IGCO. This confirmed that the IGCO had no direct application to the IR and the drafters deliberately decided to introduce only the definition of JM without importing the entire IGCO regime.

(iii) The IGCO regime did not enjoy any constitutional status. Since the IR were a necessary part of the NSL and its implementation, in case of any inconsistencies between local laws (including IGCO) and the IR (which were made pursuant to NSL 43), the latter should prevail because of NSL 62.

(e) As a matter of statutory interpretation, *"specified evidence*" could not be construed to exclude JM. (para. 14)

(i) On a plain and ordinary reading, the word "anything" in the definition of "*specified evidence*" in s. 1 of Sch. 1 of the IR covered all types of materials so long as they contained (or were likely to contain) evidence of an offence endangering national security.

(ii) The wide ambit of the natural and ordinary meaning of "*specified evidence*" was consistent with the intention of NSL 43 and the IR (i.e. to provide the law enforcement authorities with wider investigating measures) and the legislative intention of the NSL (i.e. to "effectively prevent, suppress and impose punishment for any act or activity endangering national security"): *Lai Chee Ying v Secretary for Security* [2021] HKCFI 2804, paras. 42-43. There was no reason to read down "*specified evidence*" to exclude JM in a manner that was contrary to the plain meaning it was capable of bearing.

(iii) The Plaintiff's approach (of limiting the definition of "*specified evidence*") would equate to asking the court to "read in" s. 83 of IGCO into the NSL as if the latter was an "Ordinance", which was simply impermissible.

(iv) On a proper interpretation, "*specified evidence*" was

wide enough to cover anything that contained or was likely to contain evidence of an offence endangering national security, including JM. There was no need for any express wording referring to JM.

(v) A balancing exercise between press freedom and the public interest of criminal investigation came with the word "may" in s. 2(2) of Sch. 1 of the IR. In that regard, the court was entitled to take into account JM but only as a relevant consideration, not some sort of paramount consideration.

(f) The Plaintiff's reliance on the principle of legality did not assist him. (para. 15)

(i) In the first place, there was no right for JM to be excluded altogether from the subject of a search warrant. There was, at most, a right to have freedom of the press as a relevant consideration to be duly taken into account in the issuance of a search warrant.

(ii) The principle of legality referred to the presumption that fundamental common law rights could not be overridden by general words but only by express words or necessary implication. However, it did not permit the court to disregard an unambiguous expression of legislative intention.

(iii) The drafters of the IR had in mind the IGCO regime but chose not to incorporate the same.

(iv) The comparison between NSL 42 (bail) and NSL 46 (jury trial) on the one hand and s. 2 of Sch. 1 of the IR on the other was inapt. NSL 42 and 46 operated as an exception to local laws while NSL 43 provided additional power to law enforcement authorities. Part XII of IGCO and s. 2 of Sch. 1 of the IR were two independent and self-contained regimes.

(b) Whether the Magistrate erred in authorizing the search and seizure of JM under s. 2 of Sch. 1 of the IR

6. The Court held that the Plaintiff's contentions were devoid of merit and did not advance his case on the construction of "*specified evidence*". (para. 19)

7. In relation to the argument that clear words were required to displace press freedom which was protected under the Basic Law:

(a) that the Basic Law protected freedom of the press did not mean that JM could not be disclosed or ordered for production unless (i) an application was made under Part XII of IGCO only, and (ii) the very requirements of Part XII of IGCO (and nothing else) were complied with;

(b) press freedom itself had never translated into an absolute ban against the search or seizure of JM unless and until (i) an application was made under Part XII of IGCO and (ii) the IGCO requirements were fulfilled;

(c) s. 83 of the IGCO merely provided a rebuttable presumption (i.e. a deeming provision) that any Ordinance which authorized the issue of a search warrant should not be construed as authorising the search of JM. It did not purport to confer on the IGCO any exclusive or constitutional status. In the absence of such deeming provision, no such presumption could apply to the NSL or the IR which, not being Ordinances, conferred additional powers;

(d) the drafters of the NSL could have but did not incorporate the IGCO regime in the IR. (para. 20)

8. In relation to the argument that in the absence of an express mechanism requiring a Magistrate to conduct any balancing exercise, the Magistrate could not carry out any actual balancing exercise envisaged under s. 2 of Sch. 1 of the IR:

(a) the absence of such an express mechanism did not mean the

drafters intended to exclude JM. It did not mean that a Magistrate would not conduct any balancing exercise, particularly where s. 2(2) of Sch. 1 (providing that a Magistrate "may", not "must" or "shall", issue a warrant) plainly involved an exercise of judicial discretion after balancing all relevant factors;

(b) there was no basis to suggest that a balancing exercise identical or akin to the IGCO regime was mandatory to give effect to press freedom;

(c) the Magistrate was entitled to and capable of considering the relevance of potential implications on the freedom of expression and freedom of the press as a result of search and seizure of JM in an application made under s. 2 of Sch. 1 of the IR even though there was no express mechanism akin to Part XII of IGCO. (para. 21)

9. There could not be any plausible basis for suggesting that the Magistrate "cannot" or "could not" have conducted any such balancing exercise. It was well established that whether to issue a search warrant was a discretionary power. Nothing in Sch. 1 of the IR restricted or limited the exercise of this power. In the absence of any specific statutory provision, there was no basis to presume that a Magistrate was not sufficiently qualified to carry out such an exercise. If the Commissioner of Police had reasons to believe that it was likely that the materials which he sought to access might include JM, then in fulfilment of his duty to act fairly and to place all material information before the Magistrate, he should bring that to the attention of the Magistrate for his consideration. That would be sufficient to enable the Magistrate to carry out the balancing exercise. (para. 23)

10. In relation to the argument that if the term "*specified evidence*" was given such a wide construction as to encompass JM, it would authorize the search and seizure of LPP:

(a) the comparison between LPP and JM was inapt for the reasons set out above;

(b) the Commissioner of Police did not seek to inspect or otherwise access seized materials which were protected by LPP;

(c) even on the wording of the IR itself, LPP merely operated as an exception to the disclosure requirements under the IR. It necessarily followed that LPP in fact *prima facie* fell within the definition of "*specified evidence*". (para. 24)

11. In relation to the argument that excluding JM from s. 2 of Sch. 1 of the IR would not diminish the Commissioner of Police's power to access JM when investigating offences endangering national security:

(a) if such challenge was successful, the Hong Kong courts would have no jurisdiction to exercise any coercive power over any JM under Sch. 1 of the IR;

(b) applying the Plaintiff's logic, whenever a local legislation provided for a different set of procedural safeguards for a particular right or measure, all provisions under NSL and the IR related to that right or measure would be disapplied in the absence of an express provision to the contrary. This would adversely affect the legislative intention of the NSL, i.e. to "effectively prevent, suppress and impose punishment for any act or activity endangering national security";

(c) there was no reason why the Police should be confined to the IGCO regime when s. 2 of Sch. 1 was capable of covering JM, and the Police should be free to choose whichever provision that suited its purpose;

(d) accepting the Plaintiff's construction would fundamentally and drastically restrict the Commissioner of Police's powers under the NSL/IR which clearly could not be permissible. (para. 25)

12. The intended judicial review was therefore bound to fail. Leave to apply for judicial review was refused.

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