



Summary of Judgment

**Lai Chee-ying (“Plaintiff”) v Commissioner of Police
CACV 356-357/2022; [2022] HKCA 1574**

Decision : **Appeals dismissed with costs nisi to the Commissioner of Police**

Date of Hearing : **28 September 2022**

Date of Judgment : **19 October 2022**

Background

1. In August 2020, pursuant to a search warrant issued under section 50(7) of the Police Force Ordinance (“**the 2020 Warrant**”), the Police seized from the Plaintiff’s residence, among other things, his two iPhones. The 2020 Warrant did not authorize the seizure of journalistic materials (“**JM**”). The Plaintiff commenced proceedings to have the seized materials returned to him, on the basis that, among other things, they contained JM. As such, the iPhones were ordered to be sealed by a Judge (“**Judge**”), pending determination on which part(s) of the contents of the iPhones were JM pursuant to a protocol (“**Protocol Proceedings**”).
2. On 8 July 2022, as part of the ongoing criminal investigation and based on the latest circumstances and evidence available, the Police obtained a search warrant (“**the 2022 Warrant**”) under section 2 of Schedule 1 to the Implementation Rules (“**IR**”) for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“**NSL**”). The 2022 Warrant specifically authorized the search of the digital contents of the iPhones regardless of whether they were JM, save for those claimed to be covered by legal professional privilege. It further provided that the iPhones and copies of their digital contents may only be unsealed pursuant to the Judge’s further order in the Protocol Proceedings.
3. To execute the 2022 Warrant, the Police applied to the Judge by summons for the iPhones contents, save for those covered by legal professional privilege, to be made available. The Plaintiff applied for leave for judicial review to challenge the validity of the 2022 Warrant, on grounds that the term “specified evidence” (as defined in section 1 of Schedule 1 to the IR – see the paragraph below) does not cover JM as a matter of construction. The Judge dismissed the Plaintiff’s leave application and allowed the Police’s summons. The Plaintiff appealed against both decisions to the Court of Appeal (“**CA**”).



Issue in dispute

4. Section 1 of Schedule 1 to the IR defines “specified evidence” as “anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security”. Section 2(2) provides that a magistrate may issue a warrant authorizing the search and seizure of specified evidence.
5. The only issue arising from these appeals is whether on a proper interpretation, “specified evidence” covers JM.

Department of Justice’s Summary of CA’s rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148078&currpage=T)

6. The CA observed that the proper context in which the term “specified evidence” is to be interpreted is as follows:-
 - (1) The NSL being the enabling legislation forms a crucial part of the legislative context in which the IR must be construed. (paragraph 14)
 - (2) One of the primary objectives of the NSL is to effectively suppress, prevent and punish offences and acts endangering national security. Effective investigation by the Police is crucial to achieving that objective. To that end, the Police must have sufficient powers to take all necessary measures in carrying out investigation, as is the case for other serious crimes. A proper construction of “specified evidence” in section 1 must be consistent with and give effect to that purpose. (paragraph 17(1))
 - (3) The NSL intends Schedule 1 and the local laws on search to work in tandem as a coherent whole. It means that the local laws on search powerfully informs the construction of “specified evidence”. (paragraph 17(2))
 - (4) The immense importance of JM to the freedom of the press which is to be protected in safeguarding national security in the HKSAR, as explicitly required by the NSL, is centrally important to the construction of “specified evidence”. (paragraphs 18-21)
 - (5) The principle of legality requires that if a statute does not expressly or by necessary implication override or restrict fundamental rights, it will not be construed as doing so. (paragraphs 22-23)



(6) In exercising the discretion of issuing a warrant under Schedule 1 to the IR, a magistrate is to be guided by the primary objective of the NSL, the legislative purpose of Schedule 1 to the IR, the requirements for the protection of the freedom of the press, adherence to the principle of the rule of law, and local laws on search. (paragraph 24)

5. As for local laws, the CA observed that:-

(1) The practical effect of section 83 of Interpretation and General Clauses Ordinance (“**IGCO**”) is to subject the search and seizure of JM by warrant authorized by legislation generally to the regime in Part XII of the IGCO. From the IGCO’s regime, it can be gathered that: **(a)** JM is not immune from search and seizure for the purpose of criminal investigation; **(b)** the court is required to look at all the circumstances of the case, and to consider whether it would be in the public interest that the seized material should be made use of for the purpose of the relevant investigation; and **(c)** public interest is relevant at both the issue and execution stages of the warrant. (paragraphs 26-28)

(2) The common law also recognizes the need for the court, in dealing with a search warrant for JM, to balance the competing public interests in: **(a)** protecting such material and **(b)** crime prevention and law enforcement objectives. (paragraph 29)

(3) The IGCO does not have the effect of abrogating the common law, and therefore it is not the only lawful regime to address claims based on JM. (paragraph 30)

(4) In performing its judicial gatekeeping role, the court has to balance the public interest to decide whether to issue the warrant with or without conditions. It may impose conditions to ensure that the material seized is properly sealed pending any claim of JM or determination of such claim based on public interest at an *inter partes* hearing. It may set aside or vary the warrant based on public interest upon the application by the person affected by it. (paragraphs 31-32)

7. Construing the term in the above context, the Court held that, as borne out by its natural language, “specified evidence” covers JM:-

(1) The protection afforded to JM is not absolute. Although always subject to the protection and procedural safeguards based on public interest and vigilant judicial scrutiny, JM is not immune from search and seizure in the investigation of any criminal offence which must also be true for offences endangering national security. (paragraph 34)



- (2) To serve the legislative purpose of furthering the primary objective of the NSL to effectively suppress, prevent and punish offences endangering national security, the Police must be able to carry out effective search on anything, including JM, that contains or is likely to contain evidence of an offence endangering national security. Were such material excluded from the definition of “specified evidence”, it would unduly limit the scope and hence reduce the effectiveness of police investigation. That would not be conducive to the said legislative purpose. (paragraph 35)
- (3) Such a construction does not diminish the protection afforded to the freedom of the press by the local laws or violate the principle of legality. Although Part XII of the IGCO has not been incorporated within its framework, Schedule 1 to the IR operates in tandem with the local laws on search as a coherent whole. The same protection and safeguards based on public interest for JM under the common law equally apply to a warrant under Schedule 1 to the IR. The magistrate will perform the same judicial gatekeeping role in exercising his discretion under Schedule 1 to the IR in ensuring that the search and seizure of JM is justified in the public interest. (paragraph 36)
8. The CA held that the Plaintiff’s intended judicial review against the 2022 Warrant is doomed to fail. The Judge was correct in refusing leave and allowing the Police’s summons. The Court dismissed both appeals and made an order *nisi* that the Plaintiff shall pay the costs of the two appeals. (paragraphs 44 and 45)

Department of Justice

October 2022

#191851