



Summary of Judgment

MK (“Applicant”) v Registrar of High Court (Respondent) &

Director of Legal Aid (Interested Party)

FACV 8 /2023; [2024] HKCFA 6

Decision : **Appeal unanimously dismissed**
Date of Hearing : **10 January 2024**
Date of Judgment : **22 March 2024**

Background

1. The Applicant and her same-sex partner attended a conference in June 2018 (“**the Conference**”) with Mr Hectar Pun SC (“**Mr Pun SC**”) and other counsel concerning a judicial review application. The Applicant revealed her financial status in the Conference, i.e. the Applicant and her same-sex partner jointly owned and operated a pet shop (“**Information**”).
2. Legal aid was granted to the Applicant in July 2018. Mr Pun SC was assigned as leading counsel for the Applicant in the judicial review application. In January 2019, the Director of Legal Aid (“**Director**”) received an anonymous email revealing the Information. In May 2019, Mr Pun SC wrote to the Director confirming that the Applicant had disclosed the Information during the Conference.
3. Subsequently, the Director revoked the Applicant’s legal aid certificate. The Applicant lodged a legal aid appeal arguing that the Information was provided prior to the legal aid application and should not be considered by the Director. The legal aid appeal was dismissed by the Court (“**Dismissal**”).
4. The Applicant lodged a judicial review to challenge the Dismissal. The Court of First Instance (“**CFI**”) overturned the Dismissal and held that Regulation 21 of the Legal Aid Regulations, Cap 91A (“**Regulation 21**”), i.e. the duty of assigned solicitor or counsel to report abuse of legal aid, operates with a temporal limit.
5. CFI held that the temporal limit operates to the effect that legal professional privilege (“**LPP**”) information that existed prior to legal aid application should not be disclosed at all, whereas LPP information that existed post-legal aid application may be abrogated and discloseable by virtue of Regulation 21.
6. The Director appealed to the Court of Appeal (“**CA**”). CA reversed the CFI’s decision and held that the abrogating effect of Regulation 21 against LPP



extends to occasions prior to the grant of legal aid. The integrity of the legal aid system must be protected.

7. On 7 July 2023, the Court of Final Appeal (“CFA”) granted leave to the Applicant to appeal against the CA’s decision.

Key Issue

8. The question for determination by the CFA is:-

“Upon proper interpretation of Regulation 21(1)(b) of the Legal Aid Regulations, Cap. 91A (“LAR”), what is the extent, if any, of the abrogating effect by necessary implication against legal professional privilege (“LPP”) at common law which is a right guaranteed constitutionally under Article 35 of the Basic Law of Hong Kong? In particular, does the abrogation by necessary implication extend to communications protected by legal professional privilege prior to the application for and/or granting of legal aid to the client?”

Department of Justice’s Summary of the CFA’s rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=158959)

9. The statutory scheme of legal aid has two aims: First, to provide legal assistance to litigants who have limited financial means. Second, to ensure that this assistance is not abused by litigants who fail to make true disclosure of their means (§39).
10. Although LPP is a fundamental right, it is subject to exceptions and can be waived. In this case, the Applicant had waived LPP in relation to the Information (§§32 and 35).
11. CFA concluded that whether Regulation 21(1) implicitly abrogates LPP is not the principal issue of the appeal. The live issues were temporal ones relating to matters that pre-date the assignment of solicitors or counsel. CFA considered the following questions.

Does Reg 21(1) impose a duty to report matters that predate the assignment of the solicitor or counsel?

12. CFA held that Regulation 21(1) requires the solicitor or counsel to report “forthwith” on having “reason to believe” that a specified abuse of legal aid has occurred. The “reason to believe” may well be based on facts pre-dating and



post-dating the assignment of solicitor or counsel. Hence, the duty to report to the Director covers both pre-dating and post-dating assignment periods (§103).

Does the abrogation of LPP extend to matters pre-dating assignment?

13. CFA held that the express abrogation under Regulation 12(10) would apply to the information “*which may enable the Director to perform his function under the Ordinance*”. There is no reason why the abrogation of LPP should not apply to the information arising from pre-dating assignment and it would plainly be desirable that the Director should learn of such information (§104).

Did the reporting duty imposed by Reg 21(1) apply to Mr Pun, notwithstanding that he had ceased to be an assigned lawyer at the time that he communicated the Information to the Director?

14. CFA held that Regulation 21(1) imposes a duty to report on “*an aided person’s solicitor or counsel*”. The natural meaning of this provision is that the duty is imposed on a solicitor or counsel who is currently acting as such, not including those who had ceased to act in a case. Accordingly, Mr Pun was not subject to statutory abrogation of the duty of confidentiality imposed under Regulation 21(1) when he reported the information to the Director (§§105-107).

15. CFA also held that the Applicant knew or must be deemed to have known that, when selecting Mr Pun to be assigned to act for her, Mr Pun, once assigned, would be under the reporting duty imposed by Regulation 21(1) and she has implicitly consented to this. By so doing, the Applicant waived any right to assert LPP in relation to any matter covered by the reporting duty (§108).

16. Accordingly, CFA unanimously dismisses the appeal (§109).

Civil Division
Department of Justice
22 March 2024