



Summary of Judgment

**Lai Chee-ying v Commissioner of Police
HCMP 1218/2020 & HCAL 738/2022; [2022] HKCFI 2688**

Decision : **Leave to apply for judicial review refused;
Directions for execution of search warrant given**

Date of Hearing : **22 August 2022**

Date of Judgment : **30 August 2022**

Background

1. On 10 August 2020, police officers conducted a search at the Applicant’s residence on the strength of a search warrant (“2020 Warrant”). Various items, including the Applicant’s two iPhones, were seized. The 2020 Warrant did not authorize the search and seizure of journalistic materials (“JM”). Upon the Applicant’s claim for the return of *inter alia* seized JM in HCMP 1218/2020, a protocol was put in place (“Protocol”) to determine *inter alia* whether any of the materials seized under the 2020 Warrant included JM.
2. On 8 July 2022, as part of the ongoing investigation and based on the latest circumstance and evidence available before the Police, the Police applied for, and obtained, a search warrant (“2022 Warrant”) from a designated Magistrate under section 2 of Schedule 1 of the Implementation Rules (“Implementation Rules”) 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 etc. of any parts of the digital contents of the two iPhones and their copies, including such digital contents which are subject to JM claims in HCMP 1218/2020 (“Digital Contents”).
3. In view of HCMP 1218/2020 and the Protocol, the 2022 Warrant expressly provided that the two iPhones and their copies may only be unsealed pursuant to the court’s further order/directions. Therefore, the Commissioner of Police (“Commissioner”) filed a summons for directions in HCMP 1218/2020 that the Digital Contents, including any JM but excluding those on which LPP is claimed, be made available to the Police. Upon the Applicant’s commencement of the present judicial review proceedings to challenge the validity of the 2022 Warrant, the Commissioner’s summons was adjourned to be heard together with the Applicant’s judicial review leave application.

Issue in dispute



4. Section 1 of Schedule 1 of the Implementation Rules defines “specified evidence” as “anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security”.
5. Section 2(2) provides that a magistrate may issue a warrant authorizing the search and seizure of specified evidence.
6. The sole issue in the judicial review is whether, as a matter of construction, the phrase “specified evidence” as defined in section 1 of Schedule 1 of the Implementation Rules covers JM, so as to empower the Magistrate to order the search and seizure of JM.

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

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=146838&QS=%2B%7C%28HCAL%2C738%2F2022%29&TP=JU)

7. The court observed that this judicial review is not about :
 - (1) any systemic challenge against the constitutionality of the Implementation Rules;
 - (2) any remedial interpretation of Schedule 1 of the Implementation Rules (by reading in the requirements of Part XII of the Interpretation and General Clauses Ordinance, Cap 1 (“IGCO”)); or
 - (3) the Commissioner’s decision to apply for the 2022 Warrant and/or the manner in which it was applied for. (paragraph 8)
8. The court found that the Applicant’s argument (that press freedom means that the IGCO regime is the only route by which law enforcement officers may obtain a search warrant covering JM, and hence Schedule 1 of the Implementation Rules somehow cannot cover JM) is completely untenable (paragraph 16) because:
 - (1) Part XII of IGCO cannot be taken as the only way in which procedural safeguards can be meaningfully imposed in relation to the search and seizure of JMs. The Implementation Rules are not an ordinance and it follows that the IGCO (which applies to “ordinance”) has no application. The Applicant’s construction would result in deprivation of the court’s jurisdiction over JM under the NSL and the Implementation Rules; (paragraph 10)



- (2) Press freedom does not equate any blanket prohibition against the seizure, production or disclosure of JM. JM is a relevant consideration in the exercise of the court's discretion, but no more than that. Further, it has never been the law that, save where some form of balancing exercise is specifically prescribed in the same legislation, the default position is that any statutory power ordering disclosure or production etc. must automatically be construed as excluding JM from its scope of application; (paragraph 11)
 - (3) The Applicant's attempted comparison between JM and LPP is hopelessly inapt because LPP, unlike JM, is entrenched by Article 35 of the Basic Law and does not involve a balance of interests; (paragraph 12)
 - (4) That the NSL or the Implementation Rules operate separately and additionally to the IGCO regime is further reinforced by the text itself as well as the surrounding context; (paragraph 13)
 - (5) As a matter of statutory interpretation, "specified evidence" clearly cannot be constructed to somehow exclude JM because, on a plain and ordinary reading, the word "anything" covers all types of materials so long as they contain (or is likely to contain) evidence of an offence endangering national security. The wide ambit of the natural and ordinary meaning of "specified evidence" is consistent with the intention of NSL 43 and the Implementation Rules which is to provide the law enforcement authorities with wider investigating measures as well as the legislative intention of the NSL i.e. to "effectively prevent, suppress and impose punishment for any act or activity endangering national security"; (paragraph 14) and
 - (6) The Applicant's reliance on the principle of legality does not assist him as it does not permit the court to disregard an unambiguous expression of Parliament's intention. Part XII of IGCO and section 2 of Schedule 1 of the Implementation Rules are two independent and self-contained regimes. (paragraph 15)
9. The Applicant's contentions that "the Magistrate erred in authorizing the Commissioner's officers to seize JM under section 2 of Schedule 1 of the Implementation Rules" are devoid of merit: (paragraphs 20-25)
- (1) Press freedom itself is not an absolute ban against the search and seizure of JM save under the IGCO regime.
 - (2) Section 83 of the IGCO only provides a rebuttable presumption (i.e. a deeming



provision), in the absence of an express provision to the contrary, that any Ordinance authorizing the issue of a search warrant shall not be construed as authorizing the search of JM. It does not purport to confer on the IGCO any exclusive or constitutional status. The drafts of the NSL could have but did not incorporate the IGCO regime in the Implementation Rules;

(3) That Schedule 1 contains no express mechanism does not mean that a Magistrate would not conduct any balancing exercise, particularly where section 2(2) of Schedule 1 provides that a Magistrate “may” issue a warrant, and hence it plainly involves an exercise of judicial discretion after balancing all relevant factors;

(4) There is no basis to suggest that a “balancing exercise” identical or akin to the IGCO regime is mandatory to give effect to press freedom. Equally, there is no basis to suggest that the Magistrate would not (or should not) properly consider such factor in any balancing exercise, or that the Magistrate would somehow fail to exercise his judicial discretion properly;

(5) In the present case, there is no evidence by the Applicant that the Magistrate did not take into account considerations of the competing public interests underlying search and seizure of JM. Similarly, there cannot be any plausible basis for suggesting that the Magistrate “cannot” or “could not” have conducted any such balancing exercise; and

(6) If the Applicant’s challenge is successful, this means the Hong Kong courts would have no jurisdiction to exercise any coercive power over any JM under Schedule 1 of the Implementation Rules. The Applicant’s construction would indeed fundamentally and drastically restrict the Commissioner’s powers under the NSL/Implementation Rules which clearly cannot be permissible.

10. The intended judicial review is bound to fail. The grounds raised by the Applicant are not reasonably arguable with a realistic prospect of success. Leave to apply for judicial review was refused. The 2022 Warrant remains valid and open for execution. (paragraphs 27-28)

11. The court made an order nisi that the Respondent shall have the costs of the judicial review proceedings and his summons for directions, with certificate of three counsel, to be taxed if not agreed. (paragraph 32)

Department of Justice

August 2022