



Summary of Judgment

J & Others v Commissioner of Police HCCM 191/2021; [2021] HKCFI 3586

Decision : **Applicants' summonses dismissed**
Date of Hearing : **27 October 2021**
Date of Judgment : **29 November 2021**

Background

1. The Respondent applied, and the Court granted, production orders (the "Production Orders") under section 3(2) of Schedule 7 ("Schedule 7") to the 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 (the "Implementation Rules"). The Production Orders required the Applicants to produce certain materials to the Respondent.
2. The Applicants are trustees of an association (the "Association"). By two summonses, they applied to the Court for:
 - (a) A variation of the Production Orders so that certain personal data (the "Personal Data") would be redacted from some of the materials to be produced (the "Disputed Documents") (the "Variation Summons");
 - (b) Extension of time for compliance with the Production Orders in order to apply redactions on the Disputed Documents (the "Time Summons").

The Applicants' Contentions

3. The Applicants applied to vary the Production Orders based on their following contentions:
 - (1) In an application for variation, the Respondent must satisfy the court on the relevancy and utility of the Personal Data to the investigation (the "Relevance Issue");
 - (2) Personal data was obtained by the Association pursuant to an "Assurance" of confidentiality. The right to privacy under Article 14(1) of the Hong Kong Bill of Rights and the Personal Data (Privacy) Ordinance (Cap. 486), and the



equitable doctrine of confidence, are relevant to the public interest consideration under section 3(4)(d) of Schedule 7, and also the exercise of the court's discretion (the "Public Interest Issue").

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=140487&QS=%2B&TP=JU&ILAN=en)

4. The CFI observed that the following matters are not in dispute (paragraphs 10-13):

- (1) There is no systemic challenge to the constitutionality of the provisions in Schedule 7;
- (2) There is and can be no question that confidentiality and privacy are matters which the court is entitled to take into account when considering whether or not to grant a production order under Schedule 7;
- (3) The Disputed Documents are covered by the terms of the Production Orders.

The Relevance Issue

5. Because of the coercive and potentially intrusive nature of the special powers contained in Schedule 7, a judicial safeguard (in the form of prior authorization) is put in place to ensure that the use of those special powers is not unwarranted or oppressive. The court would not authorize the issue of a production order unless it is satisfied that the relevant statutory criteria are met. (paragraph 14)
6. The court has a discretion not to order a production order even though all the statutory criteria contained in section 3(4) of Schedule 7 are met. However, the room for exercising this discretion would be restricted and the justification for refusal has to be strong in view of the plain statutory intent that the integrity and effectiveness of the investigation should not be compromised. The observations made by the Court of Final Appeal in *P v Commissioner of the ICAC* (2007) 10 HKCFAR 293 about not compromising the integrity and effectiveness of the investigation applies, if not with greater force, to a production order issued under Schedule 7 due to the utmost importance of national security. (paragraphs 20-22)
7. Following *P v Commissioner of the ICAC*, an application for variation of a production order under Schedule 7 should not be entertained when it relates to



the substance of the investigation, as it may run the risk of compromising the integrity and effectiveness of the investigation. Some latitude has to be given to the Police and due weight should be given to them as to what is likely to be relevant or useful. Besides, the Court should not impede on existing criminal investigation, or be required to carry out the impossible task of determining prematurely what is relevant or useful to the investigation. (paragraphs 23-24)

8. Based on the above, as a matter of principle, the court generally should not entertain an application or invitation to discharge or vary production orders on the ground of relevance or utility, when there has already been a decision by the court on those at the *ex parte* stage. (paragraph 26)

The Public Interest Issue

9. It is permissible for the court to re-conduct the balancing exercise under section 3(4)(d) of Schedule 7 when facing with an application for discharge or variation. The task of the court is to perform an objective assessment of the requirement of section 3(4)(d), taking into account also the affirmation evidence filed by the subject. The application of a burden of proof is not involved. Pending the resolution of the application, the better practice is to have the documents in dispute sealed in the presence of the representatives of each party and then handed to the Police. (paragraph 28)
10. Having considered the affirmations of the 3rd Applicant, the CFI concluded that the present application for redaction has no merits for the following reasons (paragraphs 29-37):
 - (1) The fact that the Applicants might breach their “Assurance” of confidentiality is in itself not sufficient to excuse them from compliance: section 3(11)(b) of Schedule 7;
 - (2) A production order, by its very design, would involve seeking information from parties other than their owners and without their consent. This coercive feature is not unique to the Implementation Rules regime and is common to other similar statutory regimes. Where a production order 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 an application meets the conditions precedent prescribed by that statute;
 - (3) The equitable duty of confidence does not extend so as to bar the disclosure



to investigatory/ regulatory authorities of matters that is the province of those authorities to investigate. As regards the Personal Data (Privacy) Ordinance (Cap. 486), compliance with Data Protection Principle 3 is exempted where the use of the personal data is for the prevention and detection of crime or where the use is by an order of a court;

- (4) The courts have consistently held that the public interests in having serious crimes detected and prosecuted outweigh a suspect's right to privacy. These case authorities must apply, *a fortiori*, to conducts endangering national security which strike at the foundation of the "One Country, Two Systems" upon which the very existence and stability of Hong Kong as a Special Administrative Region depends;
- (5) Having regard to the purpose of the investigation, the Personal Data contained in the Disputed Documents is plainly relevant to the investigation. Besides, the proposed redaction would not serve any meaningful purpose as the Police is likely to be able to obtain the same from other sources;
- (6) There is no basis to worry that the Personal Data, once produced to the Police, would be made available to the public. To the contrary, section 4 of Schedule 7 contains provisions which restrict dissemination of information obtained by the Police under sections 2 and 3;
- (7) Apart from the "Assurance", the Applicants have not shown that there would be any difficulties for them to comply with the Production Orders. In fact, the unredacted version of the Disputed Documents have been produced to the Police and sealed.

11. Accordingly, the CFI dismissed the Variation Summons. The CFI also found it unnecessary to deal with the Time Summons, which was also dismissed.

12. The CFI ordered that the Respondent shall have the costs of the Variation Summons, to be taxed if not agreed, and there be no order as to costs as regards the Time Summons.

Department of Justice

November 2021