

CACV 356/2022 and CACV 357/2022
[2022] HKCA 1574

CACV 356/2022

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO 356 OF 2022
(ON APPEAL FROM HCMP NO 1218 OF 2020)

BETWEEN

LAI CHEE-YING Plaintiff

and

COMMISSIONER OF POLICE Defendant

AND

CACV 357/2022

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO 357 OF 2022
(ON APPEAL FROM HCAL NO 738 OF 2022)

BETWEEN

LAI CHEE-YING Applicant

and

COMMISSIONER OF POLICE Putative
Respondent

(Heard together)

Before: Hon Poon CJHC, Kwan VP and Chu JA in Court

Date of Hearing: 28 September 2022

Date of Judgment: 19 October 2022

J U D G M E N T

Hon Poon CJHC (giving the judgment of the Court):

1. The main and indeed only issue arising from these appeals from the judgment of Wilson Chan J dated 30 August 2022¹ is whether on a proper interpretation, “specified evidence” in section 1 of Schedule 1 of 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 (“IR”)² covers journalistic material.

A. *The proceedings below*

2. Pursuant to a search warrant dated 6 August 2020 (“the 2020 Warrant”) issued under the Police Force Ordinance (“PFO”),³ the police searched the plaintiff’s residence and seized, among other things, his two iPhones. The 2020 Warrant did not authorize the search and seizure of journalistic material. So on 13 August 2020, the plaintiff commenced HCMP

¹ [2022] HKCFI 2688.

² The IR came into force on 7 July 2020.

³ Cap 232.

1218/2020 for directions under the court’s inherent jurisdiction for determining if the seized materials are subject to legal professional privilege or contain journalistic material, and if so, for return of the same to him. By an order of the Judge dated 19 November 2020, varied on 26 February 2021 and 4 August 2022, a protocol was put in place for sealing of the phones and the determination of the plaintiff’s claims for legal professional privilege and journalistic material.⁴

3. On 8 July 2022, as part of the ongoing criminal investigation and based on the latest circumstances and evidence available to the police, they obtained from a designated magistrate a search warrant (“the 2022 Warrant”) under section 2 of Schedule 1. In contrast to the 2020 Warrant, the 2022 Warrant specifically authorizes the search of any parts of the digital contents of the phones seized and their copies, including such digital contents which are subject to claims of journalistic material in HCMP 1218/2020 (“the Digital Contents”). It further provides that the phones and their copies may only be unsealed pursuant to the Judge’s further order. The case of the Commissioner of Police (“the Commissioner”) is that the magistrate had conducted a balancing exercise based on public interest when issuing the 2022 Warrant.

4. By a summons dated 21 July 2022 (“the Summons”), the Commissioner applied for directions that the Digital Contents, which are sealed, including those parts on which claims for journalistic material have been made, but excluding those on which legal professional privilege is claimed, be made available to the police. It would appear that the purpose of the Summons is to give effect to the 2022 Warrant. At the hearing on 5

⁴ The plaintiff’s claims were disposed of by the Judge by a judgment (not open to public) handed down on 30 September 2022: [2022] HKCFI 3003.

A August 2022, the plaintiff invited the Judge to conduct the balancing exercise
B afresh while the Commissioner submitted that he could apply either to set aside
C or judicially review the 2022 Warrant. In the end, the plaintiff commenced
D HCAL 738/2022 for leave to apply for judicial review against the validity of
E the 2022 Warrant (“the Leave Application”). The only ground raised by the
F plaintiff was that as a matter of construction, “specified evidence” as defined in
G section 1 of Schedule 1 does not cover journalistic material, so that the
H magistrate did not have the power to issue the 2022 Warrant.

5. The Judge heard both the Leave Application and the Summons at
H a rolled-up hearing on 22 August 2022. By the judgment, the Judge
I dismissed the Leave Application. After rejecting the plaintiff’s construction
J of “specified evidence” as wholly untenable, the Judge held that his intended
K judicial review is bound to fail. The Judge allowed the Summons, noting that
L the directions sought are simply to give effect to the 2022 Warrant. After
M hearing the parties, he granted an interim stay of his order until 6 September
N 2022, giving the plaintiff time to apply for urgent appeal to the Court of Appeal,
O which he subsequently did.

6. Pursuant to the order of this Court dated 5 September 2022,⁵ we
O fixed the hearing on 28 September 2022 with an interim stay pending the
P outcome of the appeals. We did so with HCCC 51/2022 in mind. On 1
Q December 2022, the plaintiff, together with other defendants, will stand trial in
R those criminal proceedings of the offence of conspiracy to print, publish, sell,
S distribute, display and/or reproduce seditious publications, contrary to sections

T ⁵ Poon CJHC and Kwan VP.

10(1)(c), 159A and 159C of the Crimes Ordinance,⁶ and the offences of conspiracy to commit collusion with a foreign country or with external elements to endanger national security, contrary to article 29(4) of The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (“NSL”). We expedited the hearing because depending on the outcome, the journalistic material in the Digital Contents might be available to the police, which in turn might potentially have an impact on the conduct of the trial in HCCC 51/2022.

B. The parties’ contentions in a nutshell

7. The term “specified evidence” is defined in section 1 of Schedule 1 to mean:

“anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security.”

8. Before us, as was before the Judge, the plaintiff contended that journalistic material is essential to the freedom of expression and the freedom of the press as guaranteed under the Basic Law and the Hong Kong Bill of Rights. There are procedural safeguards provided for in Part XII of the Interpretation and General Clauses Ordinance (“IGCO”) ⁷ to protect journalistic material from search and seizure based on public interest. When Schedule 1 was drafted, the principle that search and seizure of journalistic material must be protected by those procedures had already been firmly entrenched in our law. In order to interfere with the freedom of the press and/or deviate from those procedural safeguards, there must be express

⁶ Cap 200.

⁷ Cap 1.

language or necessary implication. If there is no intention to deviate from that principle, then “specified evidence” in section 1 cannot be construed to include journalistic material from its definition. Access to journalistic material would be left to the process in Part XII of the IGCO.

9. The Commissioner countered by submitting that there is no reason not to give the words defining “specified evidence” their natural and ordinary meaning, which clearly cover journalistic material. Further, Part XII of the IGCO is not the only lawful regime to protect journalistic material from search. Under section 2 of Schedule 1, the magistrate *may* issue a warrant. The legislative intention is that in exercising his jurisdiction to issue a warrant, the magistrate has to conduct a balancing exercise based on public interest as required under the common law. The interpretation advocated by the plaintiff is therefore based on a false premise and cannot stand.

C. Construction of “specified evidence”

10. Schedule 1 of the IR relevantly provides:

“1. **Interpretation**

In this Schedule –

...

specified evidence (指明證據) means anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security.

2. **Magistrate’s warrants**

(1) A police officer may, for investigation of an offence endangering national security, apply to a magistrate by information on oath for a warrant

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under this section in relation to the place specified in the information.

(2) A magistrate may issue a warrant authorizing a police officer with such assistance as may be necessary to enter and search any place if the magistrate is satisfied by information on oath that there is reasonable ground for suspecting that any specified evidence is in the place.

(3) A warrant issued under subsection (2) authorizes the policer officer to –

...

(b) inspect, examine, search, seize, remove and detain anything in the place that the officer reasonably believes to be specified evidence; and

...”

C1. General approach of construction

11. Within the framework of the NSL, the IR are delegated legislation made pursuant to the authorization under NSL 43(3), which provides:

“The Chief Executive shall be authorized, in conjunction with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region, to make relevant implementation rules for the purpose of applying the measures under [NSL 43(1)].”

The IR contain seven schedules corresponding to and augmenting each of the measures listed in the seven subparagraphs of NSL 43(1).

12. As a general rule, delegated legislation is interpreted in the same way as the primary legislation, with the additional consideration that since delegated legislation derives its authority from the enabling legislation, it must

be interpreted in light of the latter: see *Bennion, Bailey and Norbury on Statutory Interpretation*, Eighth Edition, §3.17, at p 114. Applying the general rule, the approach of construction for the NSL as expounded by the Court of Final Appeal in *HKSAR v Lai Chee Ying* (2021) 24 HKCFAR 33 is equally apposite for the construction of the IR.

13. As is now well-known, the Court of Final Appeal in *Lai Chee Ying* distilled from the legislative history of the NSL and NSL 1, 3, 4 and 5 the obvious legislative intention for the NSL to operate in tandem with the laws of the HKSAR, seeking convergence, compatibility and complementarity with local laws, subject to NSL 62 which gives priority to NSL in case of inconsistency: [29]. Based on that legislative intention, the Court laid down a purposive and contextual construction to an NSL provision in its application to the HKSAR by examining the matrix in which it exists, consisting of the relevant provisions of the Basic Law and the NSL, the applicable corpus of local laws including human rights and rule of law principles, the statutory norms and the common law rules, with a view to ascertaining how it is intended to operate in that context: [42] and [45].

C2. The context of “specified evidence”

14. The NSL being the enabling legislation forms a crucial part of the legislative context in which the IR must be construed: *Bennion*, *ibid*. Reading the NSL and the IR as a coherent whole, the court proceeds on the basis that the legislative purpose underlying section 1 of Schedule 1 is consistent with the NSL.

15. The following provisions in the NSL and the IR are of immediate relevance.

16. First, NSL 43(1) mandates that the NSL and the laws of the HKSAR shall apply to procedural matters including criminal investigation in respect of cases concerning offence endangering national security over which the Region exercises jurisdiction in these terms:

“When handling cases concerning offence endangering national security, the department for safeguarding national security of the Police Force of the Hong Kong Special Administrative Region may take measures that law enforcement authorities, including the Hong Kong Police Force, are allowed to apply under the laws in force in the Hong Kong Special Administrative Region in investigating serious crimes, and may also take the following measures:

(1) search of premises, vehicles, vessels, aircraft and other relevant places and electronic devices that may contain evidence of an offence;

...”

17. Two points are noteworthy:

(1) One of the primary objectives of the NSL is to effectively suppress, prevent and punish offences and acts endangering national security. That objective is repeatedly emphasized in NSL 1, NSL 3(1) and (2), NSL 5(1), NSL 8 and NSL 42(1). 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. Hence the provision in NSL 43(1). Thus understood, the legislative purpose of NSL 43(1) is

evidently to give effect to the above objective of the NSL. Derived from and in augmenting subparagraph (1) of NSL 43(1), Schedule 1 clearly shares the same legislative purpose. A proper construction of “specified evidence” in section 1 must be consistent with and give effect to that purpose.

(2) As mandated by NSL 43(1), both the NSL and local laws on search apply in an offence endangering national security, indicating the legislative intention that Schedule 1 and the local laws on search are to work in tandem as a coherent whole. It means that the local laws on search powerfully informs the construction of “specified evidence” in section 1.

18. Second, NSL 4 requires the protection of fundamental rights thus:

“Human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region. The rights and freedoms, including the freedoms of speech, of the press, of publication, of association, of assembly, of procession and of demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law.”

19. Journalistic material concerns the freedom of the press, which is a fundamental right guaranteed by article 27 of the Basic Law:

“Hong Kong residents shall have freedom ... of the press ...”

A The freedom of the press is also protected as a facet of the freedom of
B expression by article 16 of the Hong Kong Bill of Rights via article 39 of the
C Basic Law: *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, per Li CJ at p.455;
D see also *Comilang v Director of Immigration* (2019) 22 HKCFAR 59, per
E Ribeiro and Fok PJJ at [25].

F 20. Journalistic material is essential to the freedom of the press. As
G Ma CJHC (as he then was) observed in *So Wing Keung v Sing Tao Ltd* [2005] 2
HKLRD 11, at [36]:

H “Journalistic material forms the backbone of the freedom of the
I press. As a general rule, such material must be given the
J greatest possible protection from seizure or public exposure;
K otherwise the press may become inhibited in informing the
L public of matters it is entitled to know.”

M In a similar vein, the European Court of Human Rights in *Financial Times Ltd*
N *v United Kingdom* [2010] EMLR 21 emphasized at [59]-[63] that the
O protection of journalistic sources is one of the basic conditions for the freedom
P of the press; and where there is a possibility of disclosure of such a source,
Q there is potentially a chilling effect undermining the “public watchdog-role” of
R the press.

S 21. The immense importance of journalistic material to the freedom
T of the press which is to be protected in safeguarding national security in the
U HKSAR, as explicitly required by NSL 4, is centrally important to the
V construction of “specified evidence” in section 1 of Schedule 1.

22. Third, NSL 5 emphasizes the adherence to the principle of the rule
of law by stipulating:

“The principle of the rule of law shall be adhered to in preventing, suppressing, and imposing punishment for offences endangering national security.”

23. As an important facet of the rule of law, 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: *R v Home Secretary, ex p Simms* [2000] 2 AC 115, per Lord Hoffmann at p.131; *HM Treasury v Ahmed* [2010] 2 AC 534, per Lord Hope at [45]-[46], per Lord Walker at [112]; *A v Commissioner of ICAC* (2012) 15 HKCFAR 362, per Bokhary and Chan PJJ at [24]-[29]; and per Ribeiro PJ at [68]-[70]. This principle of construction is also highly relevant to the construction exercise at hand.

24. Fourth, section 2(2) of Schedule 1 confers on the magistrate a discretion in issuing a warrant. In exercising that discretion, the magistrate is guided by the above primary objective of the NSL; the above legislative purpose of Schedule 1; the requirements in NSL 4 and NSL 5 for the protection of the freedom of the press and the adherence to the principle of the rule of law; and the local laws on search, which should operate as a coherent whole with Schedule 1.

25. Arising from the local laws on search are the following features which shed considerable light on the construction of “specified evidence”.

26. First, unless there is express provision to the contrary, any statutory provisions conferring on or authorizing the issue of a search warrant shall not be construed as conferring or authorizing the search of journalistic

material: section 83 of the IGCO.⁸ The practical effect of section 83 is to subject the search and seizure of journalistic material by warrant authorized by legislation generally to the regime in Part XII of the IGCO.

27. Part XII was introduced in 1995. It is underpinned by the competing public interests in the freedom of the press and law enforcement. As Keith JA explained in *Apple Daily Ltd v Commissioner of the ICAC (No 2)* [2000] 1 HKLRD 647, p.654C-F:

“The rationale underlying Pt.XII, I believe, relates to the important role played by a free and independent press as public watchdog. The press should be able to speak out on matters of public interest without fear of reprisal, and journalists need to protect the confidentiality of the sources of the information they receive. On the other hand, the legitimate requirements of law enforcement agencies may in exceptional cases make it necessary for journalistic materials to be the subject of seizure and inspection. In this sensitive area, Pt.XII of the IGCO requires a judge of the Court of First Instance or the District Court to hold the balance between these competing interests.”

28. Three broad points emerge from the scheme in Part XII:

- (1) Journalistic material is not immune from search and seizure for the purpose of criminal investigation.
- (2) Applications for a warrant for journalistic material require the court to consider the public interest: section 89(2). A person from whom journalistic material has been seized can apply to the court for the return of such material: section 87. At a section 87

⁸ The statutory provisions which expressly cover search of journalistic material are section 21 of the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap 405 and section 5 of the Organized and Serious Crimes Ordinance, Cap 455, which already contain their own elaborate and stringent safeguards.

A hearing, the court has to consider whether it would be in the
B public interest that the seized material should be made use of for
C the purpose of the relevant investigation. As Ma CJHC pointed
D out in *So Wing Keung*, at [36(9)], this, together with section 89(2),
E permits the court to look at all the circumstances of the case.

F (3) Public interest is relevant at both the issue and execution stages of
G the warrant.

H 29. Second, as agreed between the parties, the common law also
I recognizes the need for the court, in dealing with a search warrant for
J journalistic material, to balance the competing public interests in (a) protecting
K such material and (b) crime prevention and law enforcement objectives: *R*
(*Bright*) *v* *Central Criminal Court (DC)* [2001] 1 WLR 662, per Judge LJ at p
681C-G. His Lordship emphasized:

L “Premises are not to be entered by the forces of authority or the
M State to deter or diminish, inhibit or stifle the exercise of an
N individual’s right to free speech or the press of its freedom to
O investigate and inform, and orders should not be made which
P might have that effect unless [the court] is personally satisfied that
Q the statutory preconditions to the making of an order are
R established and, as the final safeguard of basic freedoms, that in
S the particular circumstances it is indeed appropriate for an order to
T be made.”

U 30. Third, it is not suggested by the plaintiff, nor do we think it can be
V seriously suggested, that Part XII of the IGCO had expressly or by implication
abrogated the above common law rule. It follows that Mr Suen SC, for the
Commissioner is correct in his submission that Part XII of the IGCO is not the
only lawful regime to address claims based on journalistic material for
warrants.

31. Fourth, under the common law, the court performs the judicial gatekeeping role against unlawful and arbitrary interference with fundamental rights that a search warrant might entail: *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372, at [71]-[75]. The court performs that role at different stages of the warrant before it becomes *functus officio*. For example, it may impose conditions when issuing a warrant. It may set aside or vary a warrant upon the application by a person affected by it.

32. In performing its judicial gatekeeping role in connection with journalistic material, the court has to balance the public interest to decide whether to issue the warrant with or without conditions. Bearing in mind the application is made *ex parte*, if the court has some concerns about the public interest but is satisfied that the warrant should nonetheless be issued because of, say, the urgency of the matter, it may impose conditions to ensure that the material seized is properly sealed pending any claim of journalistic material or determination of such claim based on public interest at an *inter partes* hearing. Lastly, the court may set aside or vary the warrant based on public interest upon the application by the person affected by it. As to the exact procedure to be adopted for the balancing exercise, it is a matter for the magistrate to decide having regard to the actual circumstances of the case.

C3. *Construing “specified evidence”*

33. Construing “specified evidence” in the above context, it is clear that as borne out by its natural and ordinary language, it covers journalistic material.

A 34. First, despite its importance to the freedom of the press, the
B protection afforded to journalistic material is not absolute. Although always
C subject to the protection and procedural safeguards based on public interest and
D vigilant judicial scrutiny, journalistic material is not immune from search and
E seizure in the investigation of any criminal offence. As a matter of principle,
the same must be true for offences endangering national security.

F 35. Second, to serve the legislative purpose of furthering the primary
G objective of the NSL to effectively suppress, prevent and punish offences
H endangering national security as identified at [17(1)] above, the police must be
I able to carry out effective search on anything, including journalistic material,
J that contains or is likely to contain evidence of an offence endangering national
K security. Were such material excluded from the definition of “specified
L 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.

M 36. Third, such a construction does not diminish the protection
N afforded to the freedom of the press by the local laws or violate the principle of
O legality. For although Part XII of the IGCO has not been incorporated within
P its framework, Schedule 1 operates in tandem with the local laws on search as
Q a coherent whole. The same protection and safeguards based on public
R interest for journalistic material under the common law equally apply to a
S warrant under Schedule 1. The magistrate will perform the same judicial
gatekeeping role as detailed above in exercising his discretion under section 2
of Schedule 1 in ensuring that the search and seizure of journalistic material is
justified in the public interest.

37. We digress to deal with Mr Pang’s complaint that, even if the magistrate had the jurisdiction to set aside or vary the 2022 Warrant based on public interest, such remedy is illusory because any such application taken by the plaintiff now would have been time-barred under section 104(1) of the Magistrates Ordinance.⁹ We disagree.

38. Section 104(1) provides:

“Within 14 clear days after the determination in any manner by a magistrate of any matter which he has power to determine in a summary way it shall be lawful for either party thereto to apply to the magistrate to review his decision in the matter.”

It would apply only if the decision to issue a warrant is a matter which a magistrate has power to determine in a summary way.

39. As explained by this Court in *Kwok Tak Ying v HKSAR & Secretary for Justice (Interested Party)* [2021] 4 HKLRD 841, at [59] – [62], the reference to the power of a magistrate to determine in a summary way denotes his summary jurisdiction to hear and determine a matter brought before him by way of a complaint, information or charge. When a magistrate deals with an application for a warrant, he is exercising the statutory power that authorizes him to do so. He is not exercising his summary jurisdiction. His decision to issue a warrant is therefore not covered by section 104(1).

40. The discussion above has covered the parties’ main submissions. So we do not propose to separately address them point by point in detail. For

⁹ Cap 227.

A completeness, we only need to deal with two new points taken by Mr Pang, SC
B for the plaintiff, which do not concern construction.

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D 41. First, he argued that there is no evidence to show that the
E magistrate had performed the balancing exercise based on public interest in
F issuing the 2022 Warrant. However, as pointed out by Mr Suen, this
G complaint did not appear in the Form 86. Nor was it raised before the Judge.
H In the circumstances, Mr Pang cannot run it before us.

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J 42. Second, Mr Pang submitted the police ought to have applied for a
K production order under Schedule 7 of the IR instead of the 2022 Warrant.
L Again this point was neither pleaded nor raised below. More importantly, it is
M entirely a matter for the Commissioner to decide how best to carry out the
N investigation, whether by a warrant or a production order. There is no merit
O in this point.

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Q 43. For the above reasons, like the Judge, we hold that the plaintiff's
R construction of "specified evidence" is untenable.

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D. Dispositions

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P 44. Accordingly, the plaintiff's intended judicial review against the
Q 2022 Warrant is doomed to fail. The Judge was correct in refusing leave.
R As to the Summons, as the plaintiff has not advanced any other separate
S ground in opposing it, the Judge was also correct in allowing it.

45. In consequence, we dismiss both appeals. We further make an order *nisi* that the plaintiff do pay the Commissioner the costs of the two appeals, to be taxed if not agreed with a certificate for three counsel.

(Jeremy Poon)
Chief Judge of the
High Court

(Susan Kwan)
Vice President

(Carlye Chu)
Justice of Appeal

Mr Robert Pang SC, Mr Steven Kwan, Mr Albert N B Wong and Ms Samantha Lau, instructed by Robertsons, for the plaintiff/applicant

Mr Jenkin Suen SC, Mr Michael Lok and Ms Ellen Pang, instructed by the Department of Justice, for the defendant/putative respondent