

Case Summary

Lai Chee Ying (黎智英) v Commissioner of Police

CACV 356 & 357/2022, [2022] HKCA 1574, [2022] 5 HKLRD 205
(Court of Appeal)

(Full text of the Court's judgment in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=148078&currpage=T)

Before: Hon Poon CJHC, Kwan VP and Chu JA

Date of Hearing: 28 September 2022

Date of Judgment: 19 October 2022

Approach to construction of IR – NSL as enabling legislation – purposive and contextual construction of NSL applicable – NSL 43(1) to enable effective investigation by Police – press freedom – principle of legality – local laws on search and Sch. 1 to IR operating as a coherent whole – Magistrate's discretion to issue warrant under s. 2 of Sch. 1 to IR

Search of journalistic materials under ordinances – subject to Part XII of IGCO – not immune from search and seizure – judicial gatekeeping – Court to balance public interests in protecting journalistic materials and law enforcement objectives – relevant at both issue and execution stages of warrant

Construction of “specified evidence” under s. 1 of Sch. 1 to IR – natural and ordinary language – journalistic materials covered – protection of journalistic materials not absolute – need for effective police investigation – judicial gatekeeping – protection of press freedom not diminished

Background

1. The Commissioner of Police obtained a search warrant under s. 2 of Sch. 1 of the Implementation Rules for Article 43 of the NSL (“IR”), which authorized the search of the digital contents of two iPhones seized from the Plaintiff’s residence, including those that were subject to claims of journalistic material. To give effect to the search warrant, the Commissioner applied to a Judge by summons for the digital contents which had been sealed to be made available. In response, the Plaintiff applied for leave for judicial review against the validity of the search warrant on the ground that “specified evidence” as defined in s. 1 of Sch. 1 of the IR (i.e. “anything that is or contains, or that is likely to be or contain, evidence of an offence endangering national security”) did not cover journalistic material. The Judge dismissed the leave application and allowed the summons. The Plaintiff appealed against both decisions to the CA.

Major provision(s) and issue(s) under consideration

- NSL 4, 5 and 43
- IR, Sch. 1, ss. 1 and 2
- Interpretation and General Clauses Ordinance (Cap. 1) (“IGCO”), Part XII

2. In dismissing both appeals, the Court discussed: (a) the construction of the term “specified evidence” in s. 1 of Sch. 1 of the IR; and (b) whether, on a proper interpretation, “specified evidence” covered journalistic material.

Summary of the Court’s rulings*

* Editor’s note: The Plaintiff’s application for a certificate that points of law of great and general public importance were involved in the CA’s judgment under s. 32(2) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) was dismissed by the CA in *Lai Chee Ying v Commissioner of Police* [2023] HKCA 777.

(a) The construction of “specified evidence” in s. 1 of Sch. 1 of the IR

3. Within the framework of the NSL, the IR were delegated legislation made pursuant to the authorization under NSL 43(3). The NSL being the enabling legislation formed a crucial part of the legislative context in which the IR must be construed. The approach to construing the NSL as expounded by the CFA in *HKSAR v Lai Chee Ying* [2021] HKCFA 3 was equally apposite for the construction of the IR. The CFA had laid down a purposive and contextual construction to an NSL provision in its application to the HKSAR by examining the matrix in which it existed, 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 was intended to operate in that context. The legislative purpose underlying s.1 of Sch.1 of the IR should be consistent with the NSL. (paras. 11-14)

4. One of the primary objectives of the NSL was to effectively suppress, prevent and punish offences and acts endangering national security. Effective investigation by the police was crucial to achieving such objective. The police must have sufficient powers to take all necessary measures in carrying out investigation. The legislative purpose of NSL 43(1) was to give effect to the above objective of the NSL. Sch. 1 of the IR clearly shared the same legislative purpose. A proper construction of “specified evidence” in s. 1 of Sch. 1 must be consistent with and give effect to that purpose. (para. 17(1))

5. The immense importance of journalistic material to freedom of the press which was to be protected in safeguarding national security in the HKSAR (NSL 4) was centrally important to the construction of “specified evidence”. (para. 21)

6. As an important facet of the principle of the rule of law (NSL 5), the

principle of legality required that if a statute did not expressly or by necessary implication override or restrict fundamental rights, it would not be construed as doing so. This principle of construction was also highly relevant to the construction exercise at hand. (para. 23)

7. NSL 43(1) mandated that the NSL and the laws of the HKSAR should apply to procedural matters including criminal investigation in respect of cases concerning offence endangering national security over which the HKSAR exercised jurisdiction. Accordingly, both the NSL and local laws on search applied in the investigation of an offence endangering national security, indicating the legislative intention that Sch. 1 and the local laws on search were to work in tandem as a coherent whole. Hence, local laws on search powerfully informed the construction of “specified evidence” in s. 1 of Sch. 1. (paras. 16 and 17(2))

8. In exercising the discretion to issue a warrant under s. 2(2) of Sch. 1 of the IR, the magistrate was guided by: (a) the above primary objective of the NSL; (b) the above legislative purpose of Sch. 1 of the IR; (c) the requirements in NSL 4 and 5 for the protection of freedom of the press and the adherence to the principle of the rule of law; and (d) local laws on search which should operate as a coherent whole with Sch. 1. (para. 24)

9. Local laws on search had the following features which shed light on the construction of “specified evidence”:

- (a) Section 83 of the IGCO provided that unless there was express provision to the contrary, any statutory provisions authorizing the issue of a search warrant shall not be construed as authorizing the search and seizure of journalistic material. The practical effect of s. 83 was to subject the search and seizure of journalistic material by warrant authorized by legislation generally to the

regime in Part XII of the IGCO. (para. 26)

(b) Under the Part XII scheme: (i) journalistic material was not immune from search and seizure for the purpose of criminal investigation; (ii) the court had to consider whether it would be in the public interest to make use of the seized material for the purpose of the relevant investigation; and (iii) public interest was relevant at both the issue and execution stages of the warrant. (para. 28)

(c) The common law also recognized the need for the court, in dealing with a search warrant for journalistic material, to balance the competing public interests in (i) protecting such material and (ii) crime prevention and law enforcement objectives. (para. 29)

(d) Part XII of the IGCO was not the only lawful regime to address claims based on journalistic material for warrants. (para. 30)

(e) Under common law, the court performed the judicial gatekeeping role against unlawful and arbitrary interference with fundamental rights that a search warrant might entail. (paras. 31-32)

(b) Whether “specified evidence” covered journalistic material

10. Construing “specified evidence” in the above context, it covered journalistic material, as borne out by its natural and ordinary language. (para. 33)

(a) Despite its importance to freedom of the press, the protection afforded to journalistic material was not absolute. Although always subject to the protection and procedural safeguards based on public interest and vigilant judicial scrutiny, journalistic material was not immune from search and seizure in

the investigation of any criminal offence, including offences endangering national security. (para. 34)

(b) 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 journalistic material that contained or was likely to contain evidence of an offence endangering national security. Exclusion of such material from the definition of “specified evidence” would unduly limit the scope and hence reduce the effectiveness of police investigation, which would not be conducive to the legislative purpose. (para. 35)

(c) Such a construction did not diminish the protection afforded to freedom of the press by the local laws or violate the principle of legality. For although Part XII of the IGCO had not been incorporated within its framework, Sch. 1 operated in tandem with the local laws on search as a coherent whole. The same protection and safeguards based on public interest for journalistic material under common law equally applied to a warrant under Sch. 1 of the IR. The magistrate would perform the same judicial gatekeeping role in exercising his discretion under s.2 of Sch. 1 of the IR in ensuring that the search and seizure of journalistic material was justified in the public interest. (para. 36)

11. It was entirely a matter for the Commissioner to decide how best to carry out the investigation of an offence endangering national security, whether by a search warrant under s. 2 of Sch. 1 or by a production order under Sch. 7 of the IR. (para. 42)