

Case Summary

A and B v Commissioner of Police

HCCM 425/2020; [2021] HKCFI 1801; [2021] 3 HKLRD 300
(Court of First Instance)

(Full text of the Court’s redacted ruling in English at
https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=136704&currpage=T)

Before: Hon Alex Lee J

Date of Hearing: 30 April 2021

Date of Ruling: 22 June 2021

Production order (“PO”) under Sch. 7 to IR – legal professional privilege – legal advice privilege – whether document produced or brought into existence with dominant purpose to obtain legal advice – whether communication with employed lawyers involved legal skills which might claim privilege – no privilege if communication for criminal or fraudulent purpose

Journalistic material (“JM”) – meaning in s. 82, Part XII of IGCO – generous interpretation – close connection with press freedom – possession by journalist and form of material not determinative – purpose of creation and acquisition of material and intention of conveyor – informing public debate and other matters of public interest – protection of JM not absolute

PO application under Sch. 7 to IR – relevant considerations – whether materials sought might include JM – Commissioner’s duty to act fairly and to place all material information before Judge – likely JM to be brought to Judge’s attention

Part XII of IGCO – search and seizure of JM – not applicable to Sch. 7 to IR – NSL and IR not ordinances – PO not involving entry into, search of or seizure in premises – remedial interpretation not adopted – s. 84 in Part XII of IGCO not read into Sch. 7 to IR

Constitutionality of IR – whether IR made by Committee for Safeguarding National Security of HKSAR – whether NSL 14 applicable

Background

1. The Applicants took out two summonses to apply for variation of two production orders issued against them under Sch. 7 (Rules Relating to Requirement to Furnish Information and Produce Materials) of the Implementation Rules for Article 43 of the NSL (“IR”). At the hearing of the 1st Summons, it was ordered that the Applicants were to secure the material(s) on which legal professional privilege (“LPP”) and/or journalistic materials (“JM”) was claimed in sealed container(s) in the presence of a police officer of the National Security Department and deposited the sealed container(s) (“Sealed Materials”) with the Court. By the 2nd Summons, the Applicants sought an order/declaration that the Sealed Materials were subject to LPP and/or JM and be returned to them with costs.

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

- BL 27 and 39
- NSL 4, 14 and 43
- IR, Sch. 6, s. 27(1), and Sch. 7, s. 3(2)
- Interpretation and General Clauses Ordinance (Cap. 1) (“IGCO”), Part XII, ss. 82, 84 and 85

2. The Court considered:

- (a) the legal principles on legal advice privilege and whether any of the documents contained in the Sealed Materials were subject to LPP;
- (b) the meaning and scope of JM, and whether the items in dispute were JM;
- (c) if there were documents in the Sealed Materials which were not subject to LPP but were JM: (i) whether Part XII of the IGCO was directly applicable to Sch. 7 of the IR; (ii) if not, whether a scheme similar to Part XII of the IGCO should be read into Sch. 7 of the IR;
- (d) whether the court was entitled to take into account that the materials sought by the Commissioner of Police (“the Commissioner”) might include JM in considering an application for production order under Sch. 7 of the IR;
- (e) the responsibility of the Commissioner in making an *ex parte* application for production orders under Sch. 7 of the IR; and
- (f) the constitutionality of the IR.

Summary of the Court’s rulings

Legal advice privilege

3. The Court adopted the relevant legal principles on legal advice privilege as summarised by counsel for the Commissioner which were not in dispute: (para. 9)

- (a) Legal advice privilege attached to communications between a client and his lawyer, where the lawyer was acting in the course of his professional relationship and within the scope of his professional duties, under conditions of confidentiality, and for the purpose of enabling the client to seek, or the lawyer

to give, legal advice or assistance in a relevant context.

- (b) LPP did not cover all communications between lawyer and client. The applicable test in Hong Kong was whether the document was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice.
- (c) Lawyers did not cease to be regarded as professional legal advisers simply because they were employed by their clients (for example in a company's legal department), but in the nature of things those who were employed in that capacity were more likely than independent practitioners to become involved in aspects of the business that were essentially managerial or administrative in nature. To that extent it was less easy to maintain that all communications passing between them and the company's management attracted privilege.
- (d) Whether communication between an employer and members of his internal legal department was subject to LPP depended on the capacity in which the lawyer was acting and the context of the communication: (i) if a solicitor became the client's "man of business" responsible for advising the client on all matters of business, the advice might lack a relevant legal context; and (ii) the lawyer's job title was one indication, but even when employed as a lawyer, a helpful indication of whether he was acting in that capacity might be whether the communication involved the use of skills for which an external lawyer could claim privilege.
- (e) Where privileged material was communicated to a third party, an issue arose as to whether privilege had been waived. The court would consider whether the disclosure was attended by a degree of confidentiality such that there was no waiver vis-à-vis the outside world. Whether there had been a waiver was essentially a question of fact, which must be determined by reference to all the circumstances.

- (f) However, privilege did not attach to communications between lawyer and client if the purpose of the client in seeking legal advice was to facilitate criminal or fraudulent conduct.
- (g) The court might exercise its power to order disclosure if there was a *prima facie* case that the fraud or crime existed and that the documents concerned came into existence as part of the fraud or crime.

Whether documents in the Sealed Materials were subject to LPP

4. Since the Commissioner did not have access to the items in dispute, he was not in a position to transverse the Applicants' LPP claim. Therefore, it fell on the Court to inspect the disputed items to determine the validity of the Applicants' claim, bearing in mind the aforesaid legal principles. Having inspected the items and considered their contents, the Court upheld the Applicants' LPP claim as regards items 19-22 of the Sealed Materials and found that there was not a *prima facie* case that the items in dispute came into existence as part of any fraud or crime. (paras. 8, 11-14)

Meaning and scope of JM

5. The Court discussed the meaning and scope of JM before considering whether the items in dispute were JM.

- (a) The only place in the IR where JM was referred to was Sch. 6 of the IR which governed the interception of communications and covert surveillance, and s. 27 of Sch. 6 provided that JM had the meaning given by s. 82 of the IGCO*. The word

* Editor's note: Section 82 of the IGCO provided: "(1) Subject to subsection (2), in [Part XII] journalistic material (新聞材料) means any material acquired or created for the purposes of journalism. (2) Material is only journalistic material for the purposes of [Part XII] if it is in the possession of a person who acquired or created it for the purposes of journalism. (3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes."

“journalism”, however, was not defined in the IGCO or the IR. (paras. 19 and 21)

- (b) Not everything in the possession of a journalist or his employer would fall within the scope of JM. The mere fact that the material was in possession of a journalist was not determinative of its nature, nor was the form in which the material was published. The determining factor was the purpose of the creation and acquisition of the material in question and the intention of the conveyor (if applicable). (paras. 20, 26(2) and (3))
- (c) A generous interpretation should be given to JM because the protection of JM from seizure and exposure was closely connected with freedom of the press. The reason for JM enjoying a special status in various statutory provisions was its close connection with freedom of expression. (paras. 22 and 26(1))
- (d) However, the protection of JM was not absolute, for sometimes it might be in the public interest that JM should be seized or exposed. (para. 23)
- (e) A speech or article prepared for the purpose of publication would be JM if it was directed to informing public debate and on other matters of public interest. If the material was created, acquired or received for the purpose of a crime, then it would not be qualified as JM. (paras. 26(4) and 27)

Whether the items in dispute were JM

6. Having inspected the items in dispute under this head, the Court found that even if a liberal interpretation were adopted, none of the items

could be categorized as JM in the sense of Part XII of the IGCO. The Applicants failed on this ground. (paras. 29 and 34)

Whether Part XII of the IGCO was directly applicable to Sch. 7 of the IR

7. Notwithstanding the above ruling which rendered it unnecessary for the Court to consider whether Part XII of the IGCO had any application to Sch. 7 of the IR, the Court proceeded to make some observations on this matter. (para. 35)

8. As a matter of statutory construction, it could not be accepted that Part XII of the IGCO had any direct application to Sch. 7 of the IR. (paras. 36 and 38)

- (a) Section 85 of the IGCO concerned the power to enter, search, and seize materials in any “Ordinance”. However, the NSL and the IR were not “Ordinance” as defined in s. 3 of the IGCO.
- (b) Sections 84 and 85 of the IGCO applied to provisions in any Ordinance granting power to “enter”, “search” and “seize” only. Whilst production orders and search warrants were both coercive measures, the former did not involve any entry, search, seizure or other intrusion to the premises of the subject. In contrast to search and seizure of JM, the production of JM had not been singled out by the courts for special consideration.

Whether JM was a relevant consideration in considering an application for production order under Sch. 7 of the IR, and whether a scheme similar to Part XII of IGCO should be read into Sch. 7 of the IR

9. By the clear language of s. 3(2) of Sch. 7 of the IR, the court was empowered but not bound to make an order granting a production order when it was satisfied that all the conditions set out in s. 4 were met. The question was whether, in the exercise of its discretion, the court was entitled to take into account that the material sought might cover JM. Although Sch. 7 of the IR made no express reference to JM, it was made under NSL 43, and NSL 4 required the courts to respect and protect human rights in safeguarding national security in the HKSAR. Since judicial control was a fundamental feature of Sch. 7, if the court was not allowed to take into account that the material sought might cover JM, the value of this judicial safeguard would be much reduced. (paras. 39-40)

10. In the case of an application for authorization to conduct interception or covert surveillance pursuant to Sch. 6 of the IR, a matter required to be set out for the CE's consideration was whether it was likely that any information which might be contents of any JM would be obtained by conducting the interception or covert surveillance: ss. 23(b)(ix) and 24(b)(x) of Sch. 6. If it was a relevant consideration for an application for interception or covert surveillance, as a matter of logic or principle, it would also be a relevant consideration for an application for a production order. (para. 42)

11. JM enjoyed a "special status" for the purpose of Sch. 7, but only in the sense that it was a relevant consideration in the exercise of the court's discretion. The protection of JM was not absolute. There was no room to adopt a remedial interpretation by reading into Sch. 7 a comprehensive scheme similar to that contained in s. 84 of the IGCO. The reasons being: (a) by clear wording of NSL 43, the NPCSC intended to confer on the Police additional powers in handling cases concerning offences endangering national security; and (b) Sch.7 of the IR had already provided for a comprehensive and self-contained framework governing the exercise of powers in respect of production orders. (para.43)

12. In order that the judicial safeguard provided for in Sch. 7 could be meaningful and effective and that NSL 4 could be given its full effect, the court must be entitled to take into account whether the material sought under a production order might include JM. This was not based on any remedial interpretation as expounded in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, but on the language used in the NSL and the IR which the court must construe as a coherent whole in determining what it was expected to do in the discharge of its judicial gatekeeping role. (para. 44)

Responsibility of the Commissioner in making an ex parte application for production orders under Sch. 7 of the IR

13. As production orders under the IR, like ordinary search warrants, were applied for on an *ex parte* basis, the Commissioner bore the important responsibility of presenting the application fully and fairly to the court, which entailed the duty to place all material information before the judge. (para. 45)

14. The Court was inclined to hold the view that if the Commissioner had reasons to believe that it was likely that the materials which he sought to obtain by way of a production order might include JM, then in fulfilment of his duty to act fairly and to place all material information before the judge, he should bring that to the attention of the judge for his consideration. (para. 46)

Constitutionality of the IR

15. The Applicants contended that the IR, being a “subsidiary legislation”, would be inconsistent with the NSL which provided for the protection of press freedom and therefore *ultra vires*. The Court did not find it necessary to determine this issue other than expressing the preliminary view that the issue hinged largely on whether the IR were

made by the Committee for Safeguarding National Security of the HKSAR, and if so, whether NSL 14 was applicable[†]. (para.48)

Conclusion

16. For all the above reasons, the Court granted a declaration that items 19-22 of the Sealed Materials were subject to LPP and ordered that those items be returned to the Applicants pursuant to s. 3(4)(c)(ii) and s. 3(10)(a) of Sch. 7 of the IR[‡], and the rest of the items be released to the Commissioner, both after the expiry of the appeal period. (paras. 4(i), 49 and 50)

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[†] Editor's note: NSL 14(2) provided: "No institution, organisation or individual in the [HKSAR] shall interfere with the work of the Committee. Information relating to the work of the Committee shall not be subject to disclosure. Decisions made by the Committee shall not be amenable to judicial review."

[‡] Editor's note: These provisions of Sch. 7 of the IR are to the effect of excluding from the scope of a production order under s. 3(2) of Sch. 7 items subject to legal professional privilege.