

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

**CIVIL APPEAL NO. 4 OF 2012
(ON APPEAL FROM HCAL NO. 90 OF 2011)**

HUI KEE CHUN

Applicant

Before : Hon Yeung VP, Chu JA and A To J in Court

Date of Hearing : 19 April 2013

Date of Decision : 24 April 2013

DECISION

Hon Chu JA (giving the judgment of the Court):

1. By Judgment handed down on 1 February 2013, we dismissed the applicant's appeal against the decision of Chung J refusing him leave to apply for judicial review of: (1) the Enforcement Notice dated 16 August 2006 ("Enforcement Notice") issued by the Privacy Commissioner for Personal Data ("the Commissioner"); (2) the decision dated 17 April 2007 of the Administrative Appeals Board ("the Board") dismissing the applicant's appeal against the decision of the Commissioner; and (3) the conviction and sentence in Magistracy Case No. TMS12120/2007 dated 2 and 17 December 2008 respectively.

2. By Notice of Motion dated 1 March 2013, the applicant applies for leave to appeal to the Court of Final Appeal against our Judgment of 1 February 2013.

3. Application for leave to appeal to the Court of Final Appeal in civil matters is governed by section 22 of the Hong Kong Court of Final Appeal Ordinance, Cap. 484. Section 22(1)(a) and (b), which are directly relevant to this application, provide:

“(1) An appeal shall lie to the Court—

(a) as of right, from any final judgment of the Court of Appeal in any civil cause or matter, where the matter in dispute on the appeal amounts to or is of the value of \$1000000 or more, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of \$1000000 or more;

(b) at the discretion of the Court of Appeal or the Court, from any other judgment of the Court of Appeal in any civil cause or matter, whether final or interlocutory, if, in the opinion of the Court of Appeal or the Court, as the case may be, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court for decision;”

4. Our judgment of 1 February 2013 is an interlocutory judgment and does not involve a claim or question to or respecting property or some right that amounts to HK\$1 million or more. Section 22(1)(a) therefore does not apply.

5. As to section 22(1)(b), which is a matter of discretion, it has to be shown that the question involved in the appeal is one, which by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal.

6. The Notice of Motion sets out three questions, which the applicant contends, are involved in the appeal and are of great general or public importance. They are:

“(1) Whether any exemption applicable under the Personal Data (Privacy) Ordinance (“Cap. 486”) must be considered and whether it must be proved that the party being complained of (that is, the data user) has contravened the Data Protection Principle(s) (“DPP”) during the process leading to the conclusion that the data user has contravened concerned DPP and to issuing an Enforcement Notice? If NO (no), then whether Cap. 486 is in violation of the spirit of the common law where the burden of proof rests with the accusing party, and whether Cap. 486 is in infringement of the rights of persons stipulated in Article 11 of the Hong Kong Bill of Rights Ordinance, since contravention of Enforcement Notice automatically becomes an offence in Cap. 486?”

(2) Whether a conversation (being recorded or not), itself without any personal data, can be regarded as personal data under Cap. 486 when taken together with a named and identifiable person who spoke the conversation? If it can, then whether the voice in the conversation or the content of the conversation is being regarded as personal data?

(3) Whether the personal data (under Cap. 486) being used must be private facts and not public facts, and must be offensive and objectionable to a reasonable person of ordinary sensibilities? If not, then whether Cap. 486 is in infringement of the rights of persons stipulated under Article 27 of the Basic Law of Hong Kong SAR and Article 16 of the Hong Kong Bill of Rights Ordinance regarding freedom of speech, of the press and publication and freedom of opinion and expression respectively?”

7. In our views, none of the questions meet the requirements of section 22(1)(b).

8. In respect of Question (1), the applicant's complaint in the Form 86 was directed against the Commissioner's submission at the hearing before the Board that he had no duty to fish for exemption provision that might be relied upon by a party and that, in considering the applicant's appeal, the Board should ignore the exemption under section 61 of the Personal Data (Privacy) Ordinance, Cap. 486 ("PDPO"), which the applicant had not raised when he was invited to make comments on the complaint that he infringed the Data Protection Principles ("DPP"). We do not accept there are merits in this complaint for the reasons set out in paragraphs 53 and 54 of our Judgment. The matters advanced by the applicant on the present application do not persuade us otherwise.

9. We further observe there was no dispute before the Board or Chung J or in the appeal before us that in deciding to issue an Enforcement Notice, the Commissioner needs to be satisfied that there has been a contravention of the DPP. The point that was in issue is whether the Commissioner, in determining whether there has been a contravention of the DPP, comes under a duty to exhaust all the exemptions provided under the PDPO, irrespective of whether they have been invoked by the person complained of. Question (1) therefore does not arise from the appeal before us.

10. We are also of the view that Question (2) does not arise from the appeal before us. In the case under consideration, the conversations in question had been recorded and, contrary to the applicant's contention, the Commissioner did not find that the Recorded Conversations contained no personal data (see paragraph 11 of the Investigation Report). There was

further no issue before the Commissioner or the Board or before us as to whether voice could or could not be a personal data.

11. As to Question (3), “personal data” is defined in section 2 of the PDPO. The prohibition in DPP 3 is directed at the use of personal data without the consent of the data subject for a purpose different from the original collection purpose or directly related purpose. Neither the statutory definition nor DPP 3 requires the personal data to be private in nature or not ascertainable from other sources or not publicly available. There is similarly no requirement that the use of the personal data has to be objectionable to a reasonable man. In the premises and having regard to the purpose of PDPO, namely, to protect personal data, the applicant’s argument that personal data that is publicly available and/or use of personal data that is not objectionable to a reasonable man ought to fall outside the scope of the PDPO is unarguable.

12. Question (3) also raises a challenge that the PDPO infringes the freedom of speech, of the press and of publication under Article 27 of the Basic Law and freedom of opinion and expression under Article 16 of the Hong Kong Bill of Rights Ordinance, Cap. 383 (“HKBORO”). It is trite law that the rights guaranteed by Article 27 of the Basic Law and Article 16 of the HKBORO are not absolute; they may be validly restricted where it is necessary and not disproportionate: see *Leung Kwok Hung & Others v HKSAR* [2005] 8 HKCFAR 229 and Article 16(3) of HKBORO. Chung J had concluded there was no infringement of Article 27 of the Basic Law and Article 16 of the HKBORO (see paragraphs 15 to 17 of the Judgment dated 23 December 2011). The applicant has not demonstrated why the prohibition under DPP 3 of the PDPO is an impermissible

restriction of the rights under Article 27 of the Basic Law and Article 16 of the HKBORO.

13. For the reasons set out above, we are not satisfied that the three questions formulated by the applicant are involved in the appeal or that they carry great general or public importance, or otherwise, ought to be submitted to the Court for decision. The application for leave to appeal is accordingly dismissed.

(Wally Yeung)
Vice-President

(Carlye Chu)
Justice of Appeal

(A To)
Judge of the Court of
First Instance

The applicant, unrepresented, appeared in person.