

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

JOHN SHI SHENG ZHANG

PLAINTIFF

AND

THE COMMISSIONER OF POLICE & ORS

DEFENDANTS

Zhang v Commissioner of Police
[2021] HCA 16
Date of Hearing: 7 & 8 April 2021
Date of Judgment: 12 May 2021
S129/2020

ORDER

The questions of law stated in the special case filed on 11 November 2020 be answered as follows:

- (1) *Are the First Search Warrant, the Second Search Warrant, and the Third Search Warrant invalid, in whole or in part, on the ground that:*
 - (a) *they misstate the substance of s 92.3(2) of the Criminal Code (Cth)?*
 - (b) *they fail to state the offences to which they relate with sufficient precision?*
 - (c) *s 92.3(1) of the Criminal Code (Cth) is invalid on the ground that it impermissibly burdens the implied freedom of political communication?*
 - (d) *s 92.3(2) of the Criminal Code (Cth) is invalid on the ground that it impermissibly burdens the implied freedom of political communication?*

Answer: The First Search Warrant, the Second Search Warrant and the Third Search Warrant are not wholly invalid on any of the identified grounds. The question is otherwise unnecessary to answer.

- (2) *In light of the answer to Question 1, is the First s 3LA Order and/or the Second s 3LA Order invalid?*

Answer: No.

- (3) *Is s 92.3(1) of the Criminal Code (Cth) invalid on the ground that it impermissibly burdens the implied freedom of political communication?*

Answer: Unnecessary to answer.

- (4) *Is s 92.3(2) of the Criminal Code (Cth) invalid on the ground that it impermissibly burdens the implied freedom of political communication?*

Answer: Unnecessary to answer.

- (5) *If the answer to any or all of the questions (1)–(4) is "yes", what relief, if any, should issue?*

Answer: None.

- (6) *Who should pay the costs of the proceeding?*

Answer: The plaintiff.

Representation

B W Walker SC with V R Brigden for the plaintiff (instructed by Nyman Gibson Miralis)

S P Donaghue QC, Solicitor-General of the Commonwealth, and P D Herzfeld SC with S Zeleznikow for the first defendant and for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with K N Pham for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

M J Wait SC, Solicitor-General for the State of South Australia, with K M Scott for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

Submitting appearances for the second, third and fourth defendants

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Zhang v Commissioner of Police

Police – Search warrants – Validity of warrants – Validity of orders – Where officers of Australian Federal Police ("AFP") searched premises in reliance on warrants – Where officers of AFP seized material they believed relevant to offences against s 92.3(1) and (2) of *Criminal Code* (Cth) – Where officers examined and copied data from electronic devices at searched premises – Where plaintiff compelled to provide passcodes to devices pursuant to orders under s 3LA of *Crimes Act 1914* (Cth) – Where warrants purported to authorise search and seizure of material relevant to offences against s 92.3(1) and (2) of *Criminal Code* – Where plaintiff accepted warrants severable – Whether warrants identified the substance of offences against s 92.3(1) of *Criminal Code* with sufficient precision.

Constitutional law (Cth) – Implied freedom of communication about government or political matters – Where warrants purported to authorise search and seizure of material relevant to offences against s 92.3(1) and (2) of *Criminal Code* – Where plaintiff accepted warrants severable – Where plaintiff accepted various subparagraphs of s 92.3(1)(b), (c) and (d) capable of severance under s 15A of *Acts Interpretation Act 1901* (Cth) – Whether appropriate to proceed to determine constitutional validity of s 92.3(1) of *Criminal Code* or construction of "covert".

Words and phrases – "covert", "foreign government principal", "foreign influence", "foreign interference", "foreign principal", "implied freedom of political communication", "necessary to decide", "premature interpretation of statutes", "prudential considerations", "read down", "search warrants", "severable", "severance", "substance of the offences", "sufficient precision", "unnecessary and inappropriate to answer".

Acts Interpretation Act 1901 (Cth), s 15A.

Crimes Act 1914 (Cth), ss 3C(1), 3E, 3LA.

Criminal Code (Cth), ss 90.1, 90.2, 90.3, 92.3.

1 KIEFEL CJ, GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND
GLEESON JJ. Mr John Shi Sheng Zhang is an Australian citizen born in the
People's Republic of China ("the PRC"). Between October 2018 and September
2020, Mr Zhang was employed under the *Members of Parliament Staff Act 2013*
(NSW) at the New South Wales Parliament in the office of the Honourable
Shaoquett Moselmane MLC, who was a member of the New South Wales
Opposition until his suspension from the Australian Labor Party in June 2020.

2 Mr Zhang has for some time been under investigation by the Australian
Federal Police ("the AFP") for offences against s 92.3(1) and (2) of the *Criminal*
Code (Cth) suspected to have been committed by him between July 2019 and June
2020. In the context of that investigation, officers of the AFP obtained search
warrants issued under s 3E of the *Crimes Act 1914* (Cth). Each warrant purported
to authorise search and seizure of material relevant to offences against s 92.3(1)
and (2) of the *Criminal Code*.

3 Executing those warrants, officers of the AFP seized material they believed
relevant to offences against s 92.3(1) and (2) of the *Criminal Code* as well as
material they believed relevant to offences against other provisions of the *Criminal*
Code. Officers examined and copied data from mobile phones, computers, and
other electronic devices at search premises. They also removed mobile phones,
computers, and other electronic devices from search premises and took steps to
extract data from the removed devices including by using passcodes which
Mr Zhang was compelled to provide to them pursuant to orders made under s 3LA
of the *Crimes Act*. They retain the copied data and some of the seized material.
The investigation is ongoing.

4 In a proceeding in the original jurisdiction of this Court under s 75(v) of the
Constitution and s 30(a) of the *Judiciary Act 1903* (Cth), Mr Zhang seeks writs of
certiorari quashing each search warrant and each order under s 3LA of the *Crimes*
Act together with a mandatory injunction requiring the destruction or return of the
seized and copied material. He also seeks declarations of invalidity of s 92.3(1)
and (2) of the *Criminal Code*.

5 By special case in the proceeding, Mr Zhang and the Commissioner of
Police have agreed in stating questions of law for the opinion of the Full Court.
For reasons to be explained, most of those questions are unnecessary and
inappropriate to answer.

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6 To be emphasised at the outset is that Mr Zhang has no standing to challenge the validity of s 92.3(1) and (2) of the *Criminal Code* by reason merely of the ongoing AFP investigation or of the potential for him to be charged with offences against those provisions as a result of that investigation¹. His standing to challenge the validity of those provisions arises only as an aspect of his standing to challenge the validity of the warrants and orders under authority of which occurred derogation from his common law rights.

7 Mr Zhang's challenge to the validity of each warrant is on two grounds. The first is that each warrant fails to comply with s 3E(5)(a) of the *Crimes Act* as expounded in *Smethurst v Commissioner of the Australian Federal Police*² in that it does not identify the substance of the offences against s 92.3(1) and (2) of the *Criminal Code* to which it relates with sufficient precision. The second is that each warrant fails to authorise search and seizure of "evidential material" as defined in s 3C(1) of the *Crimes Act* at all because any offence against s 92.3(1) and (2) of the *Criminal Code* to which the warrant might relate does not exist by reason of the invalidity of s 92.3(1) and (2). His challenge to each order under s 3LA of the *Crimes Act* is entirely derivative upon his challenge to the corresponding search warrant.

8 Mr Zhang accepts that each search warrant is severable insofar as it purports to authorise search and seizure of material relevant to offences against s 92.3(1) and to authorise search and seizure of material relevant to offences against s 92.3(2). He also accepts that the totality of the search and seizure that occurred pursuant to each warrant was authorised if the warrant was valid in relation to offences against either provision.

9 What follows from that acceptance is that Mr Zhang cannot be entitled to the relief he seeks in the proceeding unless he can establish that the warrants are invalid in purporting to authorise search and seizure of material relevant to offences against both s 92.3(1) and s 92.3(2). Hence, it suffices for the purposes of the special case to concentrate on the challenges to each warrant's purported

1 *Kuczborski v Queensland* (2014) 254 CLR 51 at 106-110 [175]-[188]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 529-530 [106]-[107]; 376 ALR 575 at 600-601.

2 (2020) 94 ALJR 502 at 516-518 [22]-[30], 551-552 [206]-[211]; 376 ALR 575 at 582-584, 629-630.

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<i>Gordon</i>	<i>J</i>
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<i>Gleeson</i>	<i>J</i>

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authorisation of search and seizure of material relevant to offences against s 92.3(1). If the warrant is not invalid on either ground advanced in relation to offences against s 92.3(1), it is irrelevant whether the warrant is or is not invalid on either ground advanced in relation to offences against s 92.3(2).

10

Section 92.3(1) of the *Criminal Code* provides:

"A person commits an offence if:

- (a) the person engages in conduct; and
- (b) any of the following circumstances exists:
 - (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;
 - (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and
- (c) the person is reckless as to whether the conduct will:
 - (i) influence a political or governmental process of the Commonwealth or a State or Territory; or
 - (ii) influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty; or
 - (iii) support intelligence activities of a foreign principal; or
 - (iv) prejudice Australia's national security; and
- (d) any part of the conduct:
 - (i) is covert or involves deception; or
 - (ii) involves the person making a threat to cause serious harm, whether to the person to whom the threat is made or any other person; or

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(iii) involves the person making a demand with menaces.

Penalty: Imprisonment for 15 years."

11 The provision must be read with a number of definitions, one of which is the definition of "foreign principal" in s 90.2. That section provides:

"Each of the following is a *foreign principal*:

- (a) a foreign government principal;
- (aa) a foreign political organisation;
- (b) a public international organisation within the meaning of Division 70 (see section 70.1);
- (c) a terrorist organisation within the meaning of Division 102 (see section 102.1);
- (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (aa), (b) or (c);
- (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals within the meaning of paragraph (a), (aa), (b) or (c)."

12 Bearing on s 90.2(a) and (aa), the expressions "foreign political organisation" and "foreign government principal" are in turn defined in s 90.1(1) and s 90.3 respectively.

13 Section 90.1(1) relevantly provides:

"*foreign political organisation* includes:

- (a) a foreign political party; and
- (b) a foreign organisation that exists primarily to pursue political objectives; and
- (c) a foreign organisation that exists to pursue militant, extremist or revolutionary objectives."

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Section 90.3 provides:

"Each of the following is a ***foreign government principal***:

- (a) the government of a foreign country or of part of a foreign country;
- (b) an authority of the government of a foreign country;
- (c) an authority of the government of part of a foreign country;
- (d) a foreign local government body or foreign regional government body;
- (e) a company to which any of the subparagraphs of paragraph (a) of the definition of ***foreign public enterprise*** in section 70.1 applies;
- (f) a body or association to which either of the subparagraphs of paragraph (b) of the definition of ***foreign public enterprise*** in section 70.1 applies;
- (h) an entity or organisation owned, directed or controlled:
 - (i) by a foreign government principal within the meaning of any other paragraph of this definition; or
 - (ii) by 2 or more such foreign government principals that are foreign government principals in relation to the same foreign country."

15

Each search warrant identifies the substance of the offences against s 92.3(1) of the *Criminal Code* to which it relates in the following terms:

"Between about 1 July 2019 and 25 June 2020, John Shi Sheng ZHANG and others did, contrary to section 92.3(1) of the Criminal Code (Cth), intentionally engage in conduct, namely:

- (i) While acting on behalf of Chinese State and Party apparatus engaged, through a private social media chat group and in other fora, with Shaoquett MOSELMANE, an elected Australian official, to advance the interests and policy goals of a foreign principal, being the Government of the People's Republic of China (PRC), in

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Australia by providing support and encouragement to MOSELMANE for the advocacy of Chinese State interests, and

- (ii) In doing so was reckless that the conduct would influence the political process of an Australian State or Commonwealth or influence the exercise in Australia of an Australian democratic or political right or duty, in that the conduct would influence the NSW branch of the Australian Labor Party's policy positions on the PRC and the views of members of the NSW electorate in regard to the PRC; and
- (iii) A part of the conduct was covert, in that it involved communications over a private Social Media Chat Group."

16 Mr Zhang's argument that each warrant fails to comply with s 3E(5)(a) of the *Crimes Act* in that it insufficiently identifies the substance of the offences against s 92.3(1) is confined to an argument that each warrant is "unclear" as to the identity of the foreign principal. The argument is untenable. Each warrant in terms identifies the foreign principal as the Government of the PRC, which is a "foreign government principal" within the definition in s 90.3(a).

17 Notwithstanding his initial choice to challenge the validity of the whole of s 92.3(1) of the *Criminal Code*, Mr Zhang developed his argument that each warrant failed to authorise search and seizure of "evidential material" as defined in s 3C(1) of the *Crimes Act* in relation to offences against s 92.3(1) on an acceptance that the various sub-paragraphs of s 92.3(1)(b), (c) and (d) would be capable of severance under s 15A of the *Acts Interpretation Act 1901* (Cth) in the event of invalidity. Focusing on the substance of the offences against s 92.3(1) identified in the warrants, his challenge was refined in the course of oral argument to a challenge to s 92.3(1)(a) ("the person engages in conduct") read with the first part of s 92.3(1)(b)(i) ("the conduct is engaged in on behalf of ... a foreign principal"), s 92.3(1)(c)(i) and (ii) ("the person is reckless as to whether the conduct will ... influence a political or governmental process of the Commonwealth or a State or Territory ... or ... influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty") and the first part of s 92.3(1)(d)(i) ("any part of the conduct ... is covert"). That permutation of s 92.3(1), he argued, infringes the implied freedom of political communication.

18 Mr Zhang's argument that the permutation of s 92.3(1) infringes the implied freedom of political communication was ultimately explained in the course of its

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oral presentation to depend on a wide reading of the word "covert" in s 92.3(1)(d)(i): equating "covert" with "private" or "not overt". What became apparent was that he did not contend that on all available constructions of the word would the permutation offend the implied freedom of political communication. That is to say, he did not assert that the word could not be read down in accordance with the principle of construction referred to in *Residual Assco Group Ltd v Spalvins*³ to ensure validity if the wide reading for which he contended did lead to invalidity.

19 Intervening in support of the Commissioner of Police, the Attorney-General of the Commonwealth responded by proffering a narrower reading of the word "covert" in s 92.3(1)(d)(i): treating "covert" as involving some element of nefarious concealment or secrecy. Departing from the view implicitly taken in the framing of the search warrants, the Attorney-General did not argue that communication can answer the description of "covert" merely because it occurs over a private social media chat group but did argue that a choice to communicate using an encrypted social media platform can answer the description of "covert" in some circumstances. The Attorney-General was disinclined to be definitive as to when those circumstances might exist. Just as the reference to conduct that "involves deception" is sufficiently generic to cover deception of different people in respect of different things by different means, the Attorney-General argued, the reference to conduct that is "covert" is sufficiently generic to cover concealment of different things from different people through the adoption of different guises.

20 Implicit in Mr Zhang's failure to assert that the word "covert" in s 92.3(1)(d)(i) would be incapable of being read down to ensure validity was an acknowledgement that those parts of s 92.3(1) which support the offences against s 92.3(1) to which each warrant relates (being s 92.3(1)(a) read with the first part of s 92.3(1)(b)(i), s 92.3(1)(c)(i) and (ii) and the first part of s 92.3(1)(d)(i)) have some valid operation. That being so, his argument that those offences do not exist can be rejected without need of determining the constitutional argument he presents and without need of determining the attendant question of the proper construction of the word. And although the search warrants might be read as having been drafted on the understanding that conduct might be "covert" by reason only that it "involved communications over a private Social Media Chat Group",

3 (2000) 202 CLR 629 at 644 [28].

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any necessary reading down of the word "covert", such as requiring an element of nefarious concealment or secrecy, would not deprive the warrants of sufficient content or clarity to indicate the areas of the search⁴.

21 That approach to the resolution of the issues raised on the hearing of the special case accords with the unanimous reaffirmation in *Knight v Victoria*⁵ of the unanimous observation in *Lambert v Weichelt*⁶ that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties". The Court explained in *Knight*⁷ that "it is ordinarily inappropriate ... to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid". It is similarly ordinarily inappropriate in such circumstances to be drawn into a consideration of whether a legislative provision would be invalid if construed one way if the provision would be capable of being construed another way to have some valid operation to the facts before the Court.

22 In *Clubb v Edwards*⁸, Kiefel CJ, Bell and Keane JJ emphasised that the practice articulated in *Lambert* and explained in *Knight* is "not a rigid rule imposed by law which cannot yield to special circumstances" but is the "usual practice" which is "based upon prudential considerations". Prudential considerations supporting the practice include not only "avoiding the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be

4 *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 517 [28], 551 [207]; 376 ALR 575 at 584, 629.

5 (2017) 261 CLR 306 at 324 [32].

6 (1954) 28 ALJ 282 at 283.

7 (2017) 261 CLR 306 at 324 [33].

8 (2019) 267 CLR 171 at 192-193 [35]-[36], quoting *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 350-351.

applied" but also "avoiding the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation"⁹.

23 Though different views have been expressed by different members of the Court as to the application of the practice in particular cases¹⁰, the present case is a particularly strong one for adherence to the practice.

24 No less than the word "deceptive", the word "covert" in s 92.3(1)(d)(i) is on any view susceptible of a range of arguable applications involving a spectrum of arguable shades of meaning. In the present context of a challenge to search warrants, consideration of that range of arguable applications and spectrum of arguable shades of meaning was shown by the course of argument to involve an exercise in imagination. In the context of a criminal prosecution, in contrast, the preferable shade of meaning would fall to be determined (on demurrer or appeal) by reference to the precise way the prosecution sought to particularise and to prove its case. And it would fall to be determined with the assistance of argument honed by a focus on realistic outcomes aligned to the interests of the parties.

25 Lacking in the present case is "that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests"¹¹. Worse in the present case is that the lack of concreteness is accompanied by incentives for argument that run counter to the administration of justice in an adversary system.

9 *Tajjour v New South Wales* (2014) 254 CLR 508 at 588 [174].

10 See *Clubb v Edwards* (2019) 267 CLR 171 at 193-194 [36]-[40], 216-221 [135]-[148], 287-289 [329]-[337] and *Private R v Cowen* (2020) 94 ALJR 849 at 874 [107], 886 [159]; 383 ALR 1 at 28-29, 44.

11 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 318, quoting *United States v Fruehauf* (1961) 365 US 146 at 157. See also *Kuczborski v Queensland* (2014) 254 CLR 51 at 109 [186].

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26 In *North Australian Aboriginal Justice Agency Ltd v Northern Territory*, Keane J noted¹²:

"A plaintiff who chooses to pursue a strategy of invalidation of a statute may be disposed to assert that the challenged statute has an expansive operation in order to optimise the prospect that it will be held to have overreached constitutional limits. That may mean that arguments available to other persons affected by the statute, whose interests would be advanced in a practical way by a narrower interpretation of the statute, are pre-empted, without being heard, in the single-minded pursuit by the plaintiff of the constitutional issue."

Conversely, his Honour noted¹³:

"[A] party in whose interest it is to defend the constitutional validity of the legislation will naturally be disposed to accept, or indeed to urge, a narrow view of the operation of the legislation in order to optimise the prospects that it will be held to be valid. In the course of later proceedings to enforce the statute, that same party might be disposed to urge a more expansive view."

27 To similar effect, in terms applicable equally to the present case, Gageler J observed¹⁴:

"The arguments divide along battlelines not unfamiliar where questions about the constitutional validity of a law are abstracted from questions about the concrete application of that law to determine the rights and liabilities of the parties. The party seeking to challenge validity advances a literal and draconian construction, even though the construction would be detrimental to that party were the law to be held valid. The party seeking to support validity advances a strained but benign construction, even though the construction is less efficacious from the perspective of that party than the literal construction embraced by the challenger. The

12 (2015) 256 CLR 569 at 626-627 [150].

13 (2015) 256 CLR 569 at 627-628 [152].

14 (2015) 256 CLR 569 at 604 [75].

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constructions advanced reflect forensic choices: one designed to maximise the prospect of constitutional invalidity; the other to sidestep, or at least minimise, the prospect of constitutional invalidity. A court should be wary."

28 The questions reserved by the parties in the special case are appropriately answered as follows:

- (1) Are the First Search Warrant, the Second Search Warrant, and the Third Search Warrant invalid, in whole or in part, on the ground that:
 - (a) they misstate the substance of s 92.3(2) of the *Criminal Code* (Cth)?
 - (b) they fail to state the offences to which they relate with sufficient precision?
 - (c) s 92.3(1) of the *Criminal Code* (Cth) is invalid on the ground that it impermissibly burdens the implied freedom of political communication?
 - (d) s 92.3(2) of the *Criminal Code* (Cth) is invalid on the ground that it impermissibly burdens the implied freedom of political communication?

Answer The First Search Warrant, the Second Search Warrant and the Third Search Warrant are not wholly invalid on any of the identified grounds. The question is otherwise unnecessary to answer.

- (2) In light of the answer to Question 1, is the First s 3LA Order and/or the Second s 3LA Order invalid?

Answer No.

- (3) Is s 92.3(1) of the *Criminal Code* (Cth) invalid on the ground that it impermissibly burdens the implied freedom of political communication?

Answer Unnecessary to answer.

- (4) Is s 92.3(2) of the *Criminal Code* (Cth) invalid on the ground that it impermissibly burdens the implied freedom of political communication?

Answer Unnecessary to answer.

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- (5) If the answer to any or all of the questions (1)–(4) is "yes", what relief, if any, should issue?

Answer None.

- (6) Who should pay the costs of the proceeding?

Answer The plaintiff.

