Summary of Judgment

"K" v Commissioner of Police and Another
CACV 33/2020; [2021] HKCA 523
(On appeal from HCAL 2643/2019; [2019] HKCFI 3048)

Decision	:	**Applicant's appeal dismissed**
Date of Hearing	:	**5 February 2021**
Date of Judgment	:	**21 April 2021**

Background

1. The police have pursuant to the subject search warrants ("Warrants") obtained from a hospital certain medical records relating to the Applicant. The proceedings at the Court of First Instance ("CFI") raised the narrow question of whether the fact that the Warrants had not been produced to the Applicant had effectively obstructed her right of access to the courts. The CFI dismissed the Applicant's application for judicial review, and the Applicant appealed against the CFI's decision.

2. The CFI held that (1) there was no free-standing right for the Applicant to have the Warrants produced to her on demand, and (2) the Applicant's right of access to the courts was not obstructed without the Warrants because there was no impediment in law or in fact preventing her from instituting legal proceedings in the courts.

Issues in Dispute

3. The Court of Appeal ("CA") had to decide first whether to grant leave to the Applicant to run a fresh point based on the alleged infringement of her privacy rights protected by Article 14 of the Hong Kong Bill of Rights which was not pursued at the CFI.

4. Otherwise, the main issues in this appeal are:

   (1) whether there is a free-standing right for the Applicant to have the Warrants produced to her on demand; and

   (2) whether the non-production of the Warrants to her has infringed her right of

access to the courts protected by BL 35.

Department of Justice's Summary of the Court's rulings
(Full text of the judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=135102 &QS=%2B&TP=JU)

5. The CA first rejected the Applicant's application for leave to raise the fresh point based on the alleged infringement of her privacy rights on appeal by relying on the general approach founded on the notion of fairness and proper administration of justice. In specific response to the Applicant's argument that such point is an issue of general public importance raised in a public law case, the CA noted that the general approach equally applies to public law cases and private civil disputes. In addition, such point is not a pure point of law, and is fact-and-evidence sensitive which cannot be properly adjudicated when the challenge had yet to be properly formulated and the Respondent had no opportunity to put in evidence in response. The over-arching consideration should always depend on whether in the particular context of the case the preservation of the rule of law requires a particular issue to be canvassed in the particular instance for the sake of good administration. (paragraphs 37, 40, 45 and 49)

6. In affirming the CFI's holding that the Applicant does not have a free-standing right to have the Warrants produced to her, the CA held the following:

   (a) There are obvious differences between an occupier or owner of a premises to which a law enforcement officer seeks to gain access by a search warrant and the data subject of information which the officer would obtain pursuant to a search warrant. The information contained in a document could cover more than one data subjects, and the tactical need to maintain secrecy is necessarily compromised vis-à-vis an occupier on whom a search warrant is served, but this would not be so for a data subject. (paragraph 78)

   (b) In many cases it would be inimical to the public interest to require the police to disclose information concerning an ongoing criminal investigation. (paragraph 81)

   (c) The Applicant's right to commence proceedings to challenge the Warrants does not give rise to a free-standing right to have copies of the Warrants on demand. (paragraph 83)

   (d) There is no statutory or common law basis for holding that such free-

standing right exist. This is very much an area which is policy driven with immense practical considerations which the courts are ill-equipped to assess. (paragraph 84)

7. The CA also noted that privacy concerns arising from medical reports have to be balanced with the need for criminal investigation to be conducted on a confidential basis. There is a general need for the integrity of criminal investigation to be preserved, and there is no general right to information. In every case where a law enforcement agency obtains documents or information by a search warrant, the privacy of the data subject of the documents or information is intruded, and the safeguards are usually provided by the judicial gate-keeping in the issue of warrants. (paragraphs 69, 74, 79, 81, 82)

8. On the impairment of the Applicant's right of access to the courts, the Applicant's position was that, without sight of the Warrants, it would be "more difficult" for her to judicially challenge the Warrants. In affirming the CFI's holding that the non-production of the Warrants did not infringe the Applicant's right of access to the courts, the CA held that the right under BL 35 is not engaged and stated the following:

   (a) The test of legal challenge being rendered "more difficult" as the benchmark for obstruction of access to justice under BL 35 was rejected. (paragraphs 88, 89)

   (b) The so-called practical difficulties cannot constitute impairment to the essence of the Applicant's right of access to the courts. Given that the Applicant was aware that her medical reports were the subject matter of the Warrants and how the disclosure of such reports would impact on her privacy, the Applicant could effectively bring an application to the magistrate to set aside the Warrants or bring an application for judicial review to challenge their issue on the ground of intrusion of privacy rights. (paragraph 93)

   (c) There was no reason why it was necessary to identify the magistrate by his or her name in the application to set aside the Warrants. (paragraph 94)

   (d) The argument that without sight of the Warrants it is unsatisfactory to mount a challenge directed against the scope of the disclosure is more apparent than real. Further, if the eventual discovery of the Warrants provides other grounds for challenging the same, additional grounds could be added to the application to set aside or for judicial review. (paragraph

96)

9. In light of the above, the CA held that the Applicant does not need the Warrants at all for her access to the courts for seeking remedy against the alleged infringement of her privacy rights in her medical records (or otherwise).

Civil Division
Department of Justice
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