Summary of Judicial Decision

"K" v Commissioner of Police and Another
HCAL 2643/2019; [2019] HKCFI 3048

Decision	:	**Application for judicial review dismissed**
Date of Hearing	:	**4 November 2019**
Date of Judgment	:	**17 December 2019**

Background

1. The police have pursuant to a search warrant issued by a magistrate obtained from a hospital certain medical records relating to the applicant. These proceedings raise the narrow question of whether the fact that the search warrant has not been produced to the applicant has effectively obstructed her right of access to the courts.

2. On 21 August 2019, the police obtained a search warrant from a magistrate to get the applicant's personal details from a hospital. On 29 August 2019, the police obtained a second search warrant from a magistrate in respect of the medical records in the hospital in relation to the applicant's injury sustained on 11 August 2019. The medical records covered by the second warrant were obtained by the police on 4 September 2019. The present application for judicial review concerns the second one.

Issues in dispute

3. The main issues in dispute are:

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

   (2) whether the non-production of the warrant to her has infringed her right of access to the courts.

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=126139&QS=%2B&TP=JU)

4. In holding that the applicant does not have a free-standing right to have the search warrant produced to her, the CFI stated the following:

   (a) Neither the Police Force Ordinance nor the common law confers on a person who is related to the documents seized or to be seized but who is not an occupier of the premises any right to have the warrant produced to him or her. The prime concern of the common law, in requiring entry and search of premises to be authorised by law, is "the inviolability of private premises from arbitrary intrusion". (paragraph 39)

   (b) The applicant's contention that upon the demand of the person whose rights are affected by a search warrant the relevant authority must produce a copy of the search warrant for inspection would mean that any potential suspect who had somehow learnt that he might be the subject of an investigation, could demand that the police produce to him all search warrants executed or to be executed in the ongoing investigation. Such rule is not found in any statute or the existing common law. (paragraph 42)

   (c) The question of the legal rights and obligations of such persons in relation to the warrant, and of the correlative powers and duties of the executive authority that executes the warrant, is a large and novel area that merits consideration by the legislature. It would not, however, be appropriate or conducive to the development of the law for the CFI to create a rule to cater for the unusual circumstances of the present case and in so doing make a crude and general declaration without proper delineations, distinctions and limitations which the common law is ill-equipped to devise and which may need to rest on considerations of policies and practicalities rather than principle and logic. (paragraph 43)

   (d) A declaration of such free-standing right to production of the warrant on demand is inadvisable and unnecessary because in connection with legal proceedings to impugn a warrant, there are established legal mechanisms for the applicant to obtain access to the warrant if she has grounds to do so, such as by application for discovery within or before such proceedings. (paragraph 44)

5. In holding that the non-production of the warrant did not infringe the applicant's right of access to the courts, the CFI stated the following:

   (a) Although the application for the issue of search warrant is made and dealt with on an *ex parte* basis, there is the further safeguard of a possible *inter*

partes contest before the courts in respect of the legality of the search and seizure: application to the judicial officer who issued the search warrant to have it set aside; application for judicial review; and civil action for injunction to restrain the use of the documents seized and to procure their return or for damages. (paragraph 48)

(b) the applicant has not pointed to any actual legal obstruction. On the face of it, there is in the present case no impediment in law preventing the applicant from instituting legal proceedings in the courts to ventilate her arguments about rights to privacy in respect of the medical records. Also, the applicant has at all material times been legally advised and represented and capable of instituting such legal proceedings as she might be advised. (paragraphs 55 - 56)

Assuming that the applicant (like a person on whom the warrant is served) also had the right to apply to the magistrate who issued the warrant to have it set aside, the CFI found that she was not "obstructed" in or prevented from taking that course. Enquiry could be made with the magistrates' courts or the application can be submitted which will no doubt be directed to the magistrate in question. If what was needed was simply the identity of the magistrate, then that could be readily supplied by the respondent. Without more, the threshold for "obstruction" has not been met. (paragraph 59)

(c) Equally there was nothing to prevent the applicant from applying to the Court of First Instance for leave to apply for judicial review of the warrant in question, or instituting other proceedings to impugn the warrant and to seek the return of the documents, if she has valid grounds for doing so. (paragraph 60)

6. In light of the above, the CFI held that the applicant did not have a free-standing right to the production of the warrant on demand. There are existing mechanisms in the law for the applicant to seek, on proper grounds, production of the warrant in the context of actual or intended proceedings to impugn it. The fact that the respondent has thus far not produced the warrant to the applicant does not mean her right of access to the courts has been infringed. (paragraph 64)

Civil Division
Department of Justice
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