CACV 33/2020

[2021] HKCA 523

# IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF APPEAL

CIVIL APPEAL NO 33 OF 2020

(ON APPEAL FROM HCAL 2643/2019)

BETWEEN

|  |  |  |
| --- | --- | --- |
|  | “K” | Applicant |
|  | and |  |
|  | COMMISSIONER OF POLICE | Respondent |
|  | and |  |
|  | HOSPITAL CHIEF EXECUTIVE, QUEEN ELIZABETH HOSPITAL | Interested Party |

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Before: Hon Poon CJHC, Lam VP and Au JA in Court

Date of Hearing: 5 February 2021

Date of Judgment: 21 April 2021

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JUDGMENT

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Hon Poon CJHC:

1. I agree with the judgment of Lam VP.
2. Stripped of all the niceties of legal arguments to their core, the applicant’s complaint is that she would not be able to commence any legal action to protect her rights to privacy arising from her medical records, now in the police’s possession by virtue of the search warrant, when the police refused to provide the search warrant to her. Her access to courts to gain an effective remedy to protect any infringement of her privacy is therefore impeded.
3. The fatal flaw in the applicant’s case is this. It is not in dispute that the whole purpose of the search warrant was to enable the police to obtain her medical records when she adamantly refused to give consent to the Hospital Authority to release them. Her rights to privacy that she seeks to protect arise from her medical records, and not the search warrant itself. Even without the search warrant, she could have commenced legal proceedings to protect her privacy rights in the medical records, such as applying to the magistrate to set aside the search warrant, applying for judicial review or commencing a private action for injunction. Put bluntly, she simply does not need the search warrant at all. The decision of the police not to give her a copy of the search warrant does not constitute an impediment to her access to courts to seek an effective remedy against any infringement of her privacy rights in her medical records. It follows that her application for judicial review against the police’s decision and this appeal must fail.

Hon Lam VP:

1. This is the appeal by the Applicant (“**K**”) against the judgment of G Lam J (**“Judge”**) in HCAL 2643/2019 ([2019] HKCFI 3048) dated 17 December 2019 (**“Judgment”**), which concerned K’s application for judicial review in respect of the failure[[1]](#footnote-1) by the Commissioner of Police (“**Commissioner**”) to provide a copy of the search warrant issued by a magistrate whereby the police obtained from the Queen Elizabeth Hospital (“**Hospital**”) medical records in relation to K.
2. The factual background has been summarized in [3] to [17] of the Judgment with considerable details. In short, a group of protesters assembled outside the Tsim Sha Tsui Police Station in the evening of 11 August 2019. The assembly evolved into a violent protest which involved some protesters hurling objects such as bricks, stones and other projectiles (including petrol bombs) at the police station and the police officers inside. This led to standoff and confrontation between the police and the protesters.
3. As the learned Judge rightly observed at [3] of the Judgment, it is unnecessary for present purposes to examine at length what actually happened that evening and, indeed, the Court is not provided with the necessary evidence to do so in these proceedings.
4. At about 7:24 pm that evening, in the midst of the said protest, K was found lying in Nathan Road near the junction with Austin Road having suffered injuries to her right eye. At that time, she was dressed in black and was equipped with a helmet, a pair of goggles and a respirator. She claimed to be hit by “a suspected bean bag round shot by the police”. She was conveyed to the Hospital for treatment and then admitted into the Hospital.
5. The police have since been investigating the unlawful activities carried out in the vicinity of the Tsim Sha Tsui police station. There was also a dispute as to whether she was hit by a beanbag round fired by police or by a projectile from a protester’s catapult.
6. The police had tried to seek her co-operation in getting the relevant details regarding her injuries and circumstances leading to the injuries. When the request from the police was to no avail, they subsequently obtained and executed two search warrants to obtain K’s personal information and medical records:
7. The first warrant was issued by a magistrate to the police on 21 August 2019, authorizing the police to get K’s personal details from the Hospital (i.e. date of birth, HKID number, telephone number and address). This warrant was executed and the police obtained the information on 27 August 2019. And
8. The second warrant was issued by a magistrate to the police on 29 August 2019 in respect of the medical records kept by the Hospital in relation to K’s injury sustained on 11 August 2019.

These warrants shall be referred to as the “**Warrants**” hereinbelow.

1. On 29 August 2019, it was disclosed by the police to the press that the police had applied for a search warrant to obtain K’s medical records from the Hospital.
2. Between 30 August and 6 September 2019, K’s solicitors exchanged correspondences with the Hospital and the Commissioner whereby, *inter alia*, K’s solicitors asked for a copy of the search warrant if it had already been issued, raised questions as to the validity of such a warrant, objected to the disclosure of her medical records to the police pursuant to any such warrant, and expressed K’s intention to apply for judicial review and/or to set aside the warrant.
3. In press conferences on 9 and 10 September 2019, the police disclosed that the police had applied for and obtained search warrants under Section 50(7) of the Police Force Ordinance (Cap 232) (“**PFO**”) and had obtained K’s medical records from the Hospital.
4. On 9 September 2019, K lodged a notice of application for leave to apply for judicial review (Form 86) regarding the Commissioner’s refusal (which was subsequently amended to “failure”) to produce the Warrants obtained from the magistrate for the entry and search of the Hospital in relation to K’s personal data and/or medical records. The substantive relief sought, as prayed for in the Amended Form 86, were:

“ 3) An order of mandamus that the [Commissioner] provide to the Applicant the warrants obtained in relation to the Applicant’s personal data and medical records; and/or

4) A declaration that the [failure to produce the warrants] is in breach of Article 35 of the Basic Law and Article 2(3) of the International Covenant on Civil and Political Rights.”

1. Following an *inter partes* hearing on 12 September 2019, K was granted leave to apply for judicial review. As highlighted by the Judge at [18] in the judgment of 17 December 2019, the scope of the judicial review for which leave had been granted was limited in scope:

“ The application for judicial review, for which leave has been given based on the Form 86, seeks to impugn the refusal of the Commissioner to produce to the applicant the warrant.  It is said that this infringes the applicant’s right of access to the courts under Art 35 of the Basic Law.”

The narrow scope of the judicial review before the court

1. Thus, the application for judicial review in the Court below is limited to the narrow question of whether the Commissioner’s failure to provide copies of the Warrants to K has effectively obstructed K’s right of access to the Courts as guaranteed by Article 35 of the Basic Law (“**BL 35**”).
2. There was no application for judicial review of the police’s decision to apply for the Warrants, or the magistrate’s decisions to issue the Warrants, or the manner in which the Warrants were executed.
3. Nor did K bring any application for judicial review on the ground that the police’s efforts to obtain the personal data and medical records of K by the Warrants contravened K’s right of privacy under Article 14 of the Hong Kong Bill of Rights (“**BOR 14**”). Though there were references in the Form 86 to the right of privacy at paragraphs 19 to 23, in the overall scheme of that document these references only served to support the contention that K could mount a challenge before the magistrate to set aside the Warrants on the ground of violation of her right of privacy, see paragraphs 30 to 43 of the Form 86.
4. As far as the present application for judicial review was concerned, K focused on the failure of the Commissioner to supply copies of the Warrants to her, see paragraphs 45 to 50. In particular, her case as put before the Judge was summarized in a nutshell at paragraphs 49 and 50 of the Form 86:

“ F. Conclusion

49. The Applicant therefore seeks, in accordance with the principles laid down so robustly by Lam VP in *Keen Lloyd* to seek to re-engage the proper judicial gatekeeping role of the Magistrate and challenge the lawful authority of the highly intrusive search and seizure of the Applicant's medical records. This is a fundamental right guaranteed by the Basic Law which lies at the heart of Hong Kong's One Country Two Systems principle.

50. The CP has prevented the Applicant from doing so, and is in breach of Article 35 of the Basic Law, and Article 2(3) of ICCPR.”

1. Given the limited scope of the challenge, the evidence filed by the Commissioner, apart from reciting the background facts and circumstances, focused on issues relating to the disclosure of Warrants. The evidence did not address at length the justification for seeking the medical report and personal data as it might have had there been a challenge to the legality of the application for Warrants due to the engagement of K’s right of privacy.
2. The Judge also understood the application before the court to be limited to the narrow confine discussed above, see [24] to [25] of the judgment below. Throughout the hearing below, K’s case was a narrow challenge to the non-production of the Warrants.
3. It was not K’s case in this judicial review that the Court of First Instance (as opposed to the magistrate to whom an application to set aside the Warrants K intended to bring) should examine if the Warrants should be granted notwithstanding the violation of her right of privacy.
4. A fundamental premise of K’s case in this judicial review was that the non-production of the Warrants obstructed her access **to the magistrate** to set aside the Warrants. It would be self-defeating to this premise if she were to contend at the same time that she had sufficient basis (even without sight of the Warrants) to challenge the Warrants in the Court of First Instance by reference to the privacy issue.
5. Indeed, contrary to her submissions below, the Judge held that such judicial review was a viable option, see [48(2)] of the judgment in rejecting K’s case on obstruction of her access to justice. Evidently, the Judge did not regard that K had actually brought that challenge in this judicial review.
6. At the substantive judicial review hearing, K sought leave to expand the scope of the application by seeking to amend the Form 86 to include a challenge of the Commissioner’s decision to fully execute the Warrants to obtain her medical records, notwithstanding having been put on notice of K’s intention to bring an application to set aside the Warrants.
7. The Judge refused to grant the amendment. He considered that the complaint was fact-sensitive and the Commissioner had not been given a fair chance to respond to the challenge in the evidence filed: see [20] to [23] of the Judgment. He was of the view that the judicial review should be adjudicated on the basis of the challenge as advanced in the Form 86.
8. K did not appeal against this part of the Judge’s decision. At the hearing of this appeal, Mr Harris SC confirmed that K did not seek to re-open that decision.
9. Counsel however submitted that the argument on privacy was not a new point. A substantial part of his submissions was therefore premised on the seeking of the medical records by the police infringed K’s right of privacy.
10. In his Reply Skeleton Submissions, Mr Harris sought to advance the alternative case that K ought to be permitted to argue a case based on infringement of her right of privacy under BOR 14.
11. Mr Mok SC[[2]](#footnote-2) representing the Commissioner objected to K running a case based on alleged interference with her right to privacy which had hitherto not been raised. It was not pleaded nor argued at the court below.
12. With respect, we must say that it is wrong in principle and it would be an abuse of court process if K is permitted to run a case based on infringement of BOR 14 in this appeal.
13. In light of the foregoing analysis on the pleadings and the case as advanced before the Judge, we are of the firm view that there had not been any challenge to the Warrants based on infringement of privacy in this judicial review. We note that Mr Harris was unable to say that the Judge had misunderstood K’s case on the scope of her challenge in this judicial review.
14. It has to be clearly stated that it does not follow from the engagement of K’s right of privacy (which the Judge accepted at [43] of the judgment and Mr Mok also accepted) that her right has been infringed. For a proper determination on the latter, the proper formulation and preparation of a case of infringement of such right (which K had never been properly formulated or advanced in her Form 86) is important.
15. The right of privacy is not an absolute right and the interference of the same can be justified. BOR 14 only protects a person’s right of privacy against arbitrary or unlawful interference. As illustrated by *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372 and the recent case of *Sham Wing Kan v Commissioner of Police* [2020] 2 HKLRD 529, the obtaining of information by a law enforcement officer for law enforcement purposes (with or without warrant) in a proportionate manner is legitimate interference. Whether a particular interference is proportionate must depend on the factual context of each case.
16. Here, the information and medical records of K were obtained through the Warrants. We do not understand from Mr Harris that K intended to mount a systemic challenge since counsel readily acknowledged that there were cases where the police should have access to medical records of a person in a criminal investigation without informing him. Had there been a properly formulated case of infringement of the right of privacy in the Form 86, the Commissioner would probably have to file evidence concerning the proportionality of seeking the information and the Judge would have to adjudicate on the same.
17. As we have seen, either for tactical reasons or otherwise, those representing K at the court below (not Mr Harris who only appeared for the K in the appeal[[3]](#footnote-3)) chose to formulate her application for judicial review in this instance by restricting the challenge to the non-production of the Warrants. Before the Judge, she advanced her challenge on two premises: (a) a free-standing right to have a copy of the Warrants; and (b) the non-production of the Warrants obstructed her right of access to justice under BL 35. As discussed above, if she were to mount a challenge at the same time based on infringement of BOR 14, it would inherently be contradictory to her case under BL 35. Thus, it is not surprising that she did not do so in the court below.
18. The applicant is seriously out of time if she wishes now to seek leave to apply for judicial review regarding the Commissioner’s decision to ask for her personal data or the medical reports on the ground of infringement of her right of privacy.
19. The modern approach in Hong Kong on admission of fresh point on appeal are set out in *Flywin Co Ltd v Strong & Associates Ltd* (2002) 5 HKCFAR 356 as well as *Lehmanbrown Limited v Union Trade Holdings Inc* HCMP 977/2015, 17 June 2015. These authorities have been consistently applied, see *United Muslim Association of Hong Kong v Yusuf Yu* [2018] HKCA 451; *Chan Chi Wai v Chan Sau Wah* [2019] HKCA 584; *Re Qin Jun* [2018] HKCA 527; *Osman Mohammed Arab v Ng Shui Ching* [2020] HKCA 818. In *Lehmanbrown*, the approach was explained as follows:

“ Whilst the Court of Appeal obviously has power to entertain new points in an appeal, it is also clearly and firmly established that new points which are fact sensitive or otherwise affect the course of evidence or conduct of the case at the hearing below should not be allowed. Though this principle is usually applied in situations where the new points necessitate further evidence to be adduced, it is not confined to such scenarios. Very often, the raising of new point by one party may lead to the other party raising counter arguments and the consideration of such counter arguments may involve factual assessment in a different light from that undertaken by the court below. Sometimes, it may involve a different weighing of factors in the exercise of discretion. Alternatively, the other party may embark on a different course of forensic conduct if the new point were taken earlier. The appellate court, in considering whether the new point would be entertained, is entitled to take these matters into account in order to avoid unfairness to the other party.”

1. In *Qin Jun*, the Court explained why it is not just a matter of whether the applicant can find evidence in support of his case, one must have regard to the position of the respondent as well.
2. Mr Harris relied on some authorities to submit that where new points are sought to be raised on appeal, it is a matter of discretion to be guided by what justice requires in the circumstances and whether the appeal court is in possession of all the materials necessary to enable it to dispose of the matter finally. He also submitted that this is a public law case concerning the confidentiality of medical records and it is an issue of general public importance which goes far beyond the personal interest of K. Counsel said it is desirable that this area of law should be clarified.
3. We wish to take this opportunity to reiterate that the approach set out above, founded upon the notion of fairness and the proper administration of justice, is equally applicable to public law cases in general as well as private civil disputes. Of the authorities cited by Mr Harris, we only need to refer to two local authorities on the topic for present purposes. Both of them are public law cases determined by this Court.
4. In *Cathay Pacific Airways Flight Attendants Union v Director-General of Civil Aviation* [2007] 2 HKLRD 668, the Court refused leave to allow a new point to be raised. Ma CJHC (as he then was) set out some general comments in this regard at [45]:

“ (1) Where new points are sought to be raised on appeal (not having been raised in the court below), it is for the Court of Appeal to decide in its discretion whether or not to allow this.

(2) Where pure points of law are involved, the Court of Appeal may be more inclined to allow these to be raised than if factual questions or mixed law/fact issues are involved.

(3) Where in particular any factual questions are sought to be raised, the Court of Appeal will be anxious to ensure that no prejudice to the other side will be caused.  This is equally applicable to pure points of law but is more acute when factual issues are involved.

(4) If the court does allow new factual points to be raised, the other side must be given sufficient opportunity to meet them.  It does not follow from this, however, that just because the other side may be given an opportunity to deal with new factual issues that leave will be given to raise them.  The time for going into the facts is before the trial court.  It is not for the appeal courts to try and determine disputed facts.

(5) The Court of Appeal will almost invariably expect an explanation to be given as to why new points raised on appeal (whether of fact or law) were not raised in the court below.  This is an important facet of the court’s discretion.

(6) It is also incumbent on the party seeking to raise new points on appeal to alert the court and the other party or parties that this is the case.  It will not be good practice merely to ‘slip in’ new points without there being some prior indication of this.

(7) Where appropriate, an application should be made to amend pleadings or in judicial review proceedings, the Form 86A application for leave to apply for judicial review.”

1. In the present appeal, not only did Mr Harris fail to proffer any explanation for K not running the point below (his demonstrably false contention that it was not a new point cannot be regarded as such explanation), K did not apply for leave to amend her Form 86 and Notice of Appeal to formulate a proper challenge based on BOR 14 against the decision of the Commissioner to obtain the information under the Warrants.
2. Moreover, the point was only slipped in by Mr Harris in his Skeleton Submissions lodged on 8 January 2021 and then put forward as an alternative new ground in his Reply Skeleton Submissions on 1 February2021 (after Mr Mok objected to the same in his skeleton submissions of 21 January 2021). Needless to say, for the reasons highlighted by Ma CJHC, this is not the proper way to introduce a new point in an appeal.
3. At [47] of *Cathay Pacific Airways*, Ma CJHC also made this observation regarding public law cases:

“ Mr Harris attempted to argue that perhaps judicial review proceedings could be treated with less formality and that the court could be more tolerant given that public law and the public interest are often involved.  This is perhaps sometimes the case in constitutional and administrative law situations but the court must always have regard to what is fair in the circumstances and also to the administration of justice.”

1. As we have already highlighted, the BOR 14 challenge is not a pure point of law and whether the interference can be justified is fact-and- evidence sensitive. We do not accept that the court can properly adjudicate on the same in this appeal when the challenge had yet to be properly formulated and the Commissioner had no opportunity to put in evidence with regard to the same.
2. The only instance we are aware where latitude had been given in a public law case even though further evidence had to be filed is *Chee Fei Ming v Director of Food and Environmental Hygiene (No 2)* [2016] 3 HKLRD 412. In that case, this Court granted the applicants leave to re-amend the Form 86 to advance new arguments challenging a statutory provision on the ground that it does not satisfy the “prescribed by law” requirement in Article 39(2) of the Basic Law and Article 16(3) of the Hong Kong Bill of Rights. At [21] and [22] of that judgment, the Court reiterated the general principles discussed above. At [25], the Court made it clear that it would have rejected the application but for the considerations mentioned at [26] to [28].
3. The considerations set out at [26] to [28] should be read with care and they are certainly not a blanket approval for late addition of grounds for seeking judicial review advanced in an appeal. First, it should be noted that the Court in that case agreed with counsel for the respondent that strict case management discipline is of no less importance in public law cases. Second, the Court referred to its role in judicial review, viz its role as the guardian of the rule of law.
4. But this does not mean that an applicant could disregard the procedural rules (designed to safeguard fairness and efficient processing of legal proceedings which is of primary importance in the administration of justice) so long as an arguable point is put before the court. As it has recently been emphasized in the context of standing to bring a judicial review in *Kwok Cheuk Kin v President of Legislative Council* [2021] HKCA 169 at [26] by citing from the judgment of Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 at [170], the protection of the rule of law does not require every allegation of unlawful conduct by a public authority be examined by a court.
5. Though the context of the discussion in that case was standing, we are of the view that what had been said at [28] in that judgment can equally be apposite in considering whether a new point should be allowed to be taken on appeal when it is fact and evidence sensitive. In public law litigation, 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 this particular instance for the sake of good administration.
6. Coming back to *Chee Fei Ming*, the Court had regard to the following factors in concluding that leave should be granted:
7. The new issue was of general importance and there were other proceedings awaiting a decision on the same;
8. The new issue was relevant to the correct construction of the statutory provision. The construction of that provision was already an issue before the court;
9. It would be difficult to address the existing constitutional challenge before the court if the issue of construction was not resolved; and
10. In view of the prospect of the case going to the Court of Final Appeal, it would be unsatisfactory if the Court of Final Appeal had to consider a matter of great general public importance when some highly relevant aspects relating to it had not been properly examined by the courts below.
11. With these factors in mind, there was ample justification for the Court to permit the new issue to be canvassed in that appeal notwithstanding that further evidence had to be filed and the case had to be remitted to the Court of First Instance after leave to apply for judicial review had been granted. In short, the exercise of discretion in *Chee Fei Ming* was in line with the safeguard of the rule of law in the particular context of the case.
12. In contrast, the circumstances in the present appeal is wholly different. As we have analysed above, the challenge of K based on BOR 14 would be fact-and-evidence sensitive and the necessary evidence is not before the court. Mr Harris did not formulate any issue of construction of any statute in connection with that challenge. Contrary to his submissions, we do not accept that a decision in respect of a BOR 14 challenge (which had yet to be properly formulated) in the present case is a pure point of law. Nor do we accept that a decision on the special facts and circumstances of the present case could bring about any general clarification of the law as opposed to the application of well-established principle to the facts of this particular case.
13. Further, as we shall elaborate below, instead of being complimentary to K’s existing challenge based on BL 35, the viability of K bringing a BOR 14 challenge here and now substantially negates the underlying premise for the BL 35 challenge.
14. In such circumstances, there is no reason why K should not be required to commence fresh proceedings (with a proper formulation of her BOR 14 claim and an application for extension of time) if she wishes to pursue such course. Indeed, in light of the Judge’s holding that there are legal avenues for seeking redress at [48] to [50] (which we shall discuss further below), had K been serious about her challenge on substantive grounds, including ground based on BOR 14, we have great difficulty in understanding why she did not pursue such avenues and include a challenge based on infringement of BOR 14 in such pursuit. Mr Harris offered no explanation in this regard.
15. In advancing the new argument in this appeal in the manner she did, K was actually trying to circumvent the following procedural safeguards against abuse for judicial review:

(a) bringing the application for leave to challenge the decision to obtain the medical report promptly;

(b) formulating the challenge properly by pinpointing precisely the decision subject to challenge and the grounds of the challenge;

(c) setting out the evidence in support of that challenge to enable the other party to respond adequately;

(d) getting leave for judicial review in respect of the challenge.

1. The abuse is compounded by the obvious inconsistency between the ability of K to run the new case under BOR 14 and her professed inability to mount an effective legal challenge for want of sight of the Warrants under her primary case brought under BL 35.
2. It is also an abuse of the appellate process since the BOR 14 challenge was not even mentioned in the grounds of appeal set out in the Notice of Appeal and the point was only slipped in by way of skeleton submissions without first acknowledging that it is a new point. Pursuant to Order 59 Rule 3(3) of the Rules of the High Court (Cap 4A), K cannot rely on such ground without the leave of this Court.
3. Mr Harris failed to persuade us that this is a proper case for such leave to be granted. This Court will only focus on the grounds already canvassed before the Judge in this appeal.

The Decision Below

1. The Judge considered the challenge of K under two heads: (1) whether there is any free-standing right for K to have the Warrants produced to her on demand; (2) whether the non-production of the Warrants to her infringed her right of access to the courts under BL 35.
2. On (1), the Judge held that there was no free-standing right to have the Warrants produced to her on demand for the following reasons:
3. K was neither the occupier of the premises nor the owner of the documents obtained. Neither the PFO nor the common law confers on a person in her position an entitlement to a copy of the Warrants upon demand;
4. Such free-standing right (if existed) would have far-reaching implications for criminal investigation. It would mean that any potential suspect who had somehow learnt that he might be the subject of an investigation could demand the police to produce to him all search warrants executed or to be executed in an on-going investigation;
5. It is not for the common law to create such a right given it is a large and novel area and the court is ill-equipped to devise for the same in view of considerations of policies and practicalities; and
6. A declaration of such a free-standing right is unnecessary in the context of the present case because there are established legal mechanisms for K to obtain access to the Warrants if she brought proceedings to impugn the same.
7. On (2), the Judge found that K’s right of access to the courts was not obstructed because there was no impediment in law or in fact preventing her from instituting legal proceedings in the courts to ventilate her arguments based on her rights to privacy in respect of the medical records:

(1) The question is whether the essence of the right of access has been impaired, citing Ma CJ (as he then was) in *Leung Chun Ying v Ho Chun Yan Albert* (2013) 16 HKCFAR 735.

(2) There is no impediment in law in the present case as K had not pointed to any legal obstruction. There are legal avenues open to K for her to challenge the legality of the Warrants; and

(3) There is no impediment in fact:

(a) K could have obtained copies of the Warrants by way of discovery or even pre-action discovery if she had valid ground for challenging the legality of the Warrants;

(b) The absence of such copies in the meantime presented no real difficulty or actual impediment to proceed with the challenge. The identity of the magistrate issuing the Warrants could readily be ascertained by K; and

(c) The Commissioner has given an undertaking to seal up the medical records. There could still be meaningful relief associated with an application to set aside or judicially review the Warrants.

The Appeal

1. Though three grounds of appeal were raised in the Notice of Appeal of 14 January 2020, Mr Harris only relied on two of them before us. The two grounds corresponded to the two heads under which the Judge considered K’s application below.
2. For the reasons given above, we do not grant leave to Mr Harris to rely on the discrete and ill-formulated BOR 14 challenge. We would therefore focus on the two heads which had been ventilated at the court below.
3. Before we proceed to consider each head of challenge, it is useful to highlight some differences between the two heads in terms of the control over production and use of the Warrants if K succeeds. In respect of the challenge based on BL 35, the focus is on access to court and whether the non-disclosure of the Warrants impaired the bringing of legal proceedings to challenge the same by K. *Ex hypothesi*, K had to identify some legal proceedings before she could contend that her right under BL 35 was engaged. In the present case, K said she intended to apply to set aside the Warrants. The Judge held that there was no impairment in that regard and copies of the Warrants could be obtained in the course of such proceedings if necessary by way of discovery. If the Warrants were obtained through that route, K would be subject to the implied undertaking restricting the use of such copies for the purpose of the legal proceedings only. She would not be at liberty to use the same for other purposes. Further, since the disclosure of such Warrants would be made pursuant to a court order, the court could impose conditions (including redaction of information contained in the Warrants if such redaction is necessary on account of public interest immunity).
4. On the other hand, if K succeeded on her contention of having a free-standing right to the Warrants, she would be entitled to have copies of the same without having legal proceedings in place. As long as she demanded for the same, the Commissioner was obliged to give her copies and she would be free to use the information contained in the Warrants for whatever purposes she like. The court does not have any control in terms of the conditions imposed for the disclosure and her use of the Warrants.

No free-standing right to copies of the Warrants

1. Under the head of free-standing right to copies of the Warrants, Mr Harris told this Court that, unlike his predecessor, he did not advance his submission on the basis that there is a general right for a subject of a medical report to have sight on demand of a warrant regarding his medical report.
2. In the written submissions, Mr Harris referred to the particular circumstances in the present case and contended that the Commissioner did not have any proper ground for preserving the secrecy of the Warrants. The medical records would not be destroyed (as they were kept by the Hospital Authority) and the police had announced to the press on 29 August 2019 that they had applied for a warrant to search the medical records of K. Counsel contended that the general policy regarding integrity of criminal investigation could not be a ground for not acceding to the request of K in the present case as the medical records were confidential and her right of privacy was engaged and the disclosure of the Warrants would not cause any prejudice to the criminal investigation. Insofar as the Commissioner maintained a rigid policy of not disclosing the contents of warrants, Mr Harris submitted that it was an unlawful fettering of discretion, citing *Lai Tak Shing v Director of Home Affairs* CACV 201/2005, 9 October 2006 [23]-[25].
3. Whilst we understand Mr Harris’ dissociation from the wide proposition adopted by his predecessor in the court below (which, with respect, is wholly unmeritorious for the reason given by the Judge at [42] of the judgment), the adjusted position of K adopted by Mr Harris on her behalf was not the challenge advanced in the Form 86. There was no averment in the Form 86 that the Commissioner should exercise his discretion in the present instance to provide copies of the Warrants to K upon her demand in light of the special circumstances highlighted by Mr Harris and the failure to do so constituted unlawful fettering of his discretion.
4. Due to the absence of such challenge, the evidence filed on behalf of the Commissioner only refers to the general need to preserve the integrity of criminal investigation without going into the details of the criminal investigation in the present case and the possible impact on such investigation if the Warrants were disclosed to K without any conditions.
5. In other words, the Commissioner was not called upon to defend a challenge as to how he exercised his discretion in this particular case. In those circumstances, it was quite sufficient for him to refer to the general need to preserve the integrity of a criminal investigation in the evidence filed below.
6. Further, the evidence of the Senior Inspector Tsang at paragraph 25 of her affirmation of 4 October 2019 referred to the belief that the disclosure of the Warrants would prejudice the public interest in the criminal investigation and compromise the timeliness and effectiveness of investigation. It was not a case of the police following the policy rigidly.
7. The Senior Inspector also explained at paragraphs 21 and 22 of the affirmation that the disclosure at the press conference was limited to the fact that warrants had been applied for and the contents of the Warrants had not been revealed.
8. The integrity of criminal investigation is not confined to the secrecy as to the fact that a warrant has been obtained. Plainly, the contents of a warrant could reveal more information about the investigation process and the persons under investigation. There was indeed no basis for Mr Harris to assume that K was not a person subject to investigation.
9. Whilst medical reports do engage privacy concerns, criminal investigation is conducted on a confidential basis. In the absence of an allegation of the police not exercising the power for the proper purpose of criminal investigation in the Form 86 and the evidence in support, we do not find the contention of Mr Harris (which had not been pleaded in the Form 86 and no leave had been granted for such challenge to be brought) challenging the exercise of discretion to be properly before this Court.
10. Nor do we see any merit in such contention on the existing materials before us.
11. In his Reply Skeleton Submissions, Mr Harris referred to some authorities to support a contention that common law should develop a requirement for the Warrants to be produced in the present case where the interference with the right of privacy was disproportionate and/or unnecessary.
12. With respect, in canvassing this argument Mr Harris ran into the same problem with his other new contentions. In the Form 86, there was no challenge to the proportionality of the Warrants and the investigation conducted by the police. The Grounds of Review pleaded in Section E of the Form 86 focused on the judicial gatekeeping role and K’s intended application to set aside the Warrants. There was no formulation of a free-standing right to copies of the Warrants on the basis of proportionality.
13. None of the authorities cited by Mr Harris addressed the question of a free-standing right of a person other than the occupier or owner of the premises to obtain a copy of the warrant on account of his privacy interest. There are obvious differences between an occupier or owner of a premises to which a law enforcement officer seeks to gain access by a warrant and the data subject of information which the officer would obtain pursuant to a warrant. To start with, the information contained in a document could cover more than one (and sometimes many) data subjects. Further, the tactical need to maintain secrecy is necessarily compromised vis-à-vis an occupier on whom a warrant is served. But this would not be so for a data subject. Thirdly, the impact of such free-standing rights being conferred on a data subject on the integrity of a criminal investigation is much greater as illustrated the absurdity of such general right highlighted by the Judge at [42] of the judgment.
14. Some authorities cited by Mr Harris support the proposition that, subject to public interest immunity, the police should provide information which had been made available to the magistrate to a claimant applying to set aside a warrant: *Gittins v Central Criminal Court* [2011] EWHC 131 at [25] and [64] to [66]; *R (Golfrate Property Management Ltd) v Southwark Crown Court* [2014] 2 Cr App R 12; *R (Naralambous) v Crown Court at St Albans* [2018] AC 236. These are not authorities on a free-standing right as the applicants in those cases had commenced legal proceedings challenging the warrants. In the last case, it was made clear by the UK Supreme Court that there is no general right to information and it is case specific and facts sensitive. At [65] Lord Mance DPSC said:

“ In my judgment, it cannot be axiomatic in this context that even the gist of the relevant information must be supplied to any person (such as the occupier or some other person claiming some proprietary, possessory or other interest in the documents) claiming to be affected by, and wishing to object to, the warrant or the search and seizure. Every case must of course be considered in the light of its particular circumstances. But, as a general proposition, I answer issue (v)[[4]](#footnote-4) in the negative.”

1. Citing *Eccles v Bourque* [1975] 2 SCR 739 at 746; *George v Rockett & Anor* (1990) 170 CLR 104 at 110; *Carroll v Wijovich* (1991) 58 A Crim R 243 at 247 and *Lemesk Pty Ltd v Easterby* (1993) 66 A Crim R 337 at 351, Mr Harris laid emphasis on the need to safeguard against the intrusion of right of privacy. Like the Judge, we have no quarrel that the right of privacy is engaged and there should be safeguards for the same in the common law in Hong Kong. This is well established in our local jurisprudence as well, see for example the recent judgment in *Sham Wing Kan v Commissioner of Police* [2020] 2 HKLRD 529.
2. But it does not follow from the engagement of the right of privacy that the subject of investigation or the data subject of a piece of information obtained by the police in an investigation should be informed of such investigation and be entitled to copies of warrants for the search of his or her personal data. 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. As acknowledged by the Supreme Court in *R (Naralambous) v Crown Court at St Albans*, supra at [27], in many cases it would be inimical to the public interest to require the police to disclose information concerning an ongoing criminal investigation.
3. The safeguards are usually provided by the judicial gate-keeping in the issue of warrants. The right of a person affected to apply for the setting aside of warrants is part and parcel of these safeguards. As we shall see, there is no impediment to K in that regard had she chosen to do so in the present case.
4. We are prepared to accept (as the Judge did) that a person like K had the standing to apply to the magistrate to set aside the Warrants or apply to the High Court for judicial review of the Warrants. But the existence of such right does not give rise to a free-standing right to have copies of the Warrants on demand.
5. We also agree with the Judge that there is no statutory or common law basis for holding that such free-standing right exist. It should be noted that in the Personal Data (Privacy) Ordinance (Cap 486), a request by a data subject under Section 18(1) for access to information held by a data user is subject to the specific exemption of criminal investigation under Section 58. This represents the policy adopted by our legislature. As the Judge said, this is very much an area which is policy driven with immense practical considerations which the courts are ill-equipped to assess. Contrary to the suggestion of Mr Harris, we are not satisfied that this appeal is an appropriate occasion for this Court to formulate new development of the common law in this regard.

No obstruction to access to justice

1. We shall now turn to the challenge based on BL 35.
2. It is now accepted by Mr Harris on behalf of K that she could have launched a challenge to the Warrants. Counsel however said that without sight of the Warrants it would be “more difficult” for her to proceed. When pressed about the difficulties, counsel said K could not assess whether she could challenge the scope of the authorization.
3. At the material times, K was aware that her medical reports were produced by the Hospital Authority to the police pursuant to the Warrants and this should be sufficient for her to maintain that her privacy interest had been engaged. Thus, Mr Harris accepted at paragraph 2 of his written Reply Skeleton Submissions that it would have been possible for K to bring a judicial review on the present facts based directly on an impermissible infringement of her rights under BOR 14.
4. Mr Harris adopted a test of legal challenge being rendered “more difficult” as the benchmark for obstruction of access to justice under BL 35.
5. With respect, there is no authority to support such test. The cases cited by him *R (Children’s Rights Alliance for England) v Secretary of State for Justice* [2013] 1 WLR 3667 (which highlighted the duty of the state not to place obstacles in the way of access to justice as opposed to a positive duty to seek out and inform person with potential claims) and *Golder v United Kindom* (1975) 1 EHRR 524 were consistent with the approach of the Judge in asking if the essence of the right of access to justice have been impaired in fact or in law (which was held to be the correct test by the Court of Final Appeal in *Ng Yat Chi v Max Share Ltd* (2005) 8 HKCFAR 1 at [73]).
6. Counsel further submitted that the Judge erred in finding that there were alternative avenues for K to obtain the Warrants as suggested in the Judgment. Such avenues posed major practical difficulties, counsel said, given the high threshold for pre-action discovery and there is no tort of breach of privacy at common law. He also referred to the inability of K’s legal advisers to properly advise her on the merits of any intended legal action without sight of the Warrants.
7. He also said it was not realistic to suggest that K could obtain the Warrants by writing to the Magistracy without knowing the name of the magistrate issuing the Warrants and the offer by the Commissioner to provide such name only came at the hearing below.
8. On the other hand, Mr Mok submitted that the “practical difficulties” relied upon by Mr Harris were irrelevant and/or insufficient to establish that the essence of her right of access to the courts had been impaired. As K did not mount any systemic challenge (whether against any laws or police practice in not providing a search warrant to any person in K’s position) it is only a question to be decided on the evidence as to whether she was deprived of such access in the present case by virtue of the failure to provide her with copies of the Warrants. The alleged difficulties cannot possibly show that the essence of her right of access to the courts was impaired as K did not explain how her intended setting aside application had been prevented or impeded by the non-production of the Warrants.
9. We agree with Mr Mok that the so-called practical difficulties cannot constitute impairment to the essence of the right of access to court. Given that K 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, we are not impressed by Mr Harris’ submission that K could not effectively bring an application to the magistrate to set aside the Warrants or alternatively bring an application for judicial review to challenge the issue of the Warrants on the ground of intrusion of her right of privacy.
10. There is no evidence to support the bare assertion of Mr Harris that the magistracy would not inform those acting for K of the name of the magistrate if they were to lodge an application to set aside the Warrants. Apparently, the solicitors acting for K had not attempted to do so. There was actually no reason why it was necessary to identify the magistrate by his or her name in the application to set aside the Warrants. Once an application is filed, we do not believe that those in the magistracy would not take the matter on board to place the same before the relevant magistrate.
11. We fail to see the relevance of the alleged high threshold of pre-action discovery and uncertainty of the tort of invasion of privacy in the present context when it is clear that K could have mounted legal challenge by way of application to set aside the Warrants or judicial review even without sight of the Warrants. After the commencement of such proceedings, the discovery of the Warrants and the pertaining issue of public interest immunity could, if necessary, be determined by the court in the proceedings.
12. Though it may be said that without sight of the Warrants it is unsatisfactory to mount a challenge directed against the scope of the disclosure, in the present case this is more apparent than real. It was known to K (and the police did not dispute) that the subject matter of the Warrants were the medical reports (and there is no suggestion that apart from the medical reports and the personal particulars the police obtained other information concerning K from the Hospital Authority) and she intended to challenge the Warrants by reason of her interest in privacy over the medical reports. 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 judicial review.
13. We agree with the Judge’s conclusions that there was no impediment in fact or in law to K’s intended legal challenge to the Warrants. Her right of access to court had not been obstructed by the non-production of the Warrants.
14. Having reached such a view, there is no room for the application of any proportionality analysis. Such analysis proceeds from the premise that an obstruction of access to justice is established and thus it is necessary to justify the same. If there is no obstruction of access, the right under BL 35 is not engaged.
15. Thus, the challenge based on BL 35 has no merit and the Judge was correct in dismissing the same.

No basis for allegations of bad faith and improper motive

1. In his opening skeleton submissions[[5]](#footnote-5), Mr Harris cast some aspersions against the motive of the police in procuring the medical reports by the Warrants. Mr Mok took strong exception to those submissions when such attacks had not been made in the Form 86 or the affirmation of K.
2. No such attack had been advanced at the court below.
3. We agree with Mr Mok that in these circumstances it is not proper for such attacks to be made in counsel’s submission. Given the absence of such attacks in the Form 86 and K’s affirmation, the Commissioner had not had the opportunity to respond to the same by way of evidence. The allegations are essentially one of bad faith and abuse of powers. Accusations of such nature not supported by any pleading or evidence should not be advanced by lawyers: see the observations of Reyes J in *Yue Yuen Marketing Co Ltd v Commissioner of Inland Revenue* [2014] 4 HKLRD 761 at [39] in the context of a first instance hearing. *A fortiori*, such accusations should not be entertained by this Court when these allegations are raised for the first time by way of submission in an appeal without being alluded to in the Notice of Appeal.

Disposition

1. For the above reasons, we dismiss the appeal and order K to pay the costs of the Commissioner with certificate for 2 counsel.

Hon Au JA:

1. I agree with the judgment of Lam VP.

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| (Jeremy Poon)  Chief Judge of the High Court | (M H Lam)  Vice President | (Thomas Au)  Justice of Appeal |

Mr Paul Harris SC, Ms Linda Wong and Mr Albert N B Wong, instructed by Ho Tse Wai & Partners, assigned by the Director of Legal Aid, for the applicant

Mr Johnny Mok SC, Mr Mike Lui instructed by the Department of Justice, for the respondent

Mayer Brown, for the interested party, attendance excused

1. In the original Form 86, K sought leave to apply for judicial review in respect of the Commissioner’s “refusal” to provide a copy of the Warrant (as defined below). In light of the Commissioner’s suggestion that there was never any decision to “refuse” K’s request for a copy of the Warrant, K sought leave to amend the Form 86 to apply for judicial review in respect of the Commissioner’s “failure” to provide the Warrant. Leave was granted by the Judge at the substantive hearing on 4 November 2019: Judgment [18]-[19]. [↑](#footnote-ref-1)
2. He appeared with Mr Mike Lui for the Commissioner. [↑](#footnote-ref-2)
3. K was represented by another leading counsel (but with the same junior counsel Ms L Wong and Mr A Wong in the court below). [↑](#footnote-ref-3)
4. Issue (v) is whether the principles concerning minimum disclosure, if necessary by gisting, apply to proceedings concerning search warrants. See [60]. [↑](#footnote-ref-4)
5. At paras 61 to 67 of the skeleton submissions of 8 January 2021. Though Mr Harris tried to back-track slightly at paras 23 and 24 of his Reply skeleton submissions, he maintained the allegation of improper collateral purpose by way of suggestion. [↑](#footnote-ref-5)